



C.M.A(MD)No.214 of 2020.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 12.04.2023
DELIVERED ON : 01.06.2023

CORAM

THE HON'BLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.214 of 2020
and
C.M.P(MD)Nos.3420 of 2020 &3355 of 2023

1.Mohamed Noohu

2.Musa Sadat

3.Mohamed Sulaiman Lebbai

4.Abdul Malik

5.Ida Santhoshkumar

6.Dolly Gracia

7.Shirly Martia

... Appellants/
Respondents 1-4 & 6-8/
Defendants 1-5 & 7-9

Vs.

1.Juli Premkumar Asirvatham

2.Daphni Herdis

... Respondents/Appellants/
Plaintiffs

3.Iyyappan

... Respondent/5th Respondent/
6th Defendant



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PRAYER: Civil Miscellaneous Appeal is filed under Order 43 Rule 1 of Code of Civil Procedure, to set aside the judgment and decree passed in A.S.No.34 of 2016 on the file of the IV Additional District Court, Tirunelveli, dated 20.12.2019 remanding to the tile of Principal Sub Court, Tirunelveli in O.S.No.201 of 2010.

For Appellants : Mr.S.Meenakshi Sundaram
Senior Counselling
for Mr.M.Sengu Vijay

For R1&R2 : Mr.V.Sukumar

JUDGEMENT

Defendants are the appellants.

2. The respondents 1 and 2 herein as plaintiffs had filed O.S.No. 201 of 2010 on the file of Principal Sub Court, Tirunelveli for the relief of declaration of title, declaration that the settlement deeds, dated 15.06.1984 is void, to declare that the sale deed in favour of defendants 2 to 5, dated 21.07.2000 is not binding upon the plaintiffs, recovery of possession and other reliefs.

3. It is the case of the plaintiffs that the suit property originally belonged to Glory Arthur who had passed away on 21.01.1974 as a spinster. According to the plaintiffs, the said Glory Arthur had executed



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a registered Will under Exhibit A.1 on 26.06.1969 in favour of her sister's grandson one Prem Kumar Asirvatham. Under the said Will, she had cancelled the previous Will, dated 17.03.1967 which was registered in Doc.No.11 of 1967. After the death of Glory Arthur ,the legatee under the Will, namely Prem Kumar Asirvatham was enjoying the property till 04.07.1984 and thereafter, it devolved upon the 1st plaintiff, who is the wife and the 2nd plaintiff who is the daughter of the said Prem Kumar Asirvatham. Therefore, the plaintiffs are the owners of the property.

4. The plaintiffs have further contended that the 1st defendant in the suit is the brother of Prem Kumar Asirvatham and he was taking care of the properties after the death of Prem Kumar Asirvatham. He had created Exhibit B.4 Will, dated 05.12.1973 as if it was executed by Glory Arthur in favour of one Grace Asirvatham, who is the mother of Prem Kumar Asirvatham and Santhosh Kumar Asirvatham. Based upon the said Will, Grace Asirvatham is said to have executed two gift deeds in favour of the 1st defendant on 15.06.1984. Based upon the gift deeds, the 1st defendant has executed a sale deed in favour of defendants 2 to 5 on 21.07.2000. The 6th defendant is said to be a lessee under defendants 2 to 5. Since the title is disputed by the defendants, the present suit has been filed.



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5. The defendants have contended that though under Exhibit A.1, dated 26.06.1969, a Will was executed by Glory Arthur in favour of Prem Kumar Asirvatham, the said Will was cancelled by another Will, dated 05.12.1973. Under the new Will, the property was bequeathed in favour of Glory Arthur's elder's sister's daughter, namely Grace Asirvatham. Therefore, 05.12.1973 Will alone is the last Will of Glory Arthur and therefore, the plaintiffs do not have any title to the property.

6. The trial Court after considering the oral and documentary evidence arrived at a finding that Exhibit B.4 Will has been proved in accordance with law and therefore, it is the last Will of deceased Glory Arthur. The trial Court further found that one of the attestors of Exhibit B.4 Will has been examined as D.W.2 and his evidence has not been discredited by the plaintiffs. The trial Court further found that there is no document to establish that Prem Kumar Asirvatham had taken possession of the property pursuant to Exhibit A.1 Will, dated 26.06.1969. There is also no evidence to establish that the 1st defendant was managing the property on behalf of the plaintiffs.



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7. The trial Court further found that the plaintiffs have not established their possession or enjoyment over the suit schedule property as per Exhibit A.1 Will. On the other hand, the 1st defendant had filed O.S.No.662 of 1994 challenging the enhancement of property tax in the year 1996 and a decree has been passed under Exhibit B.12. The trial Court further found that when the Will under Exhibit B.4 in favour of Grace Asirvatham is valid, the settlement deeds executed by the said Grace Asirvatham on 15.06.1984 under Exhibits B.13 and B.14 in favour of the 1st defendant cannot be questioned by the plaintiffs.

8. Challenging the said judgment and decree, the plaintiffs have filed A.S.No.34 of 2016 on the file of IV Additional District Court, Tirunelveli. The first appellate Court found that no specific issue has been framed with regard to the genuineness and validity of Exhibit B.4 Will by the trial Court. The first appellate Court further found that the plaintiffs have produced only the registration copy of Exhibit A.1 Will and they have not explained the reason for not producing the original of Exhibit A.1 Will. The first appellate Court also found that the 1st defendant has not offered any explanation for not filing Exhibit B.4 Will along with the written statement. The first appellate Court further raised doubts with regard to the deposition of D.W.2, who is the attesting



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witness of Exhibit B.4 Will. The first appellate Court further found that D.W.2 has not stated anything in his chief examination with regard to the mental health of the deceased Glory Arthur. The first appellate Court further found that there is no reference about Exhibit B.4 Will in Exhibit B.13 and B.14 settlement deeds executed by Grace Asirvatham in favour of the 1st defendant. After raising all these doubts with regard to Exhibit B.4 and the deposition of the attesting witness, namely D.W.2, the first appellate Court ultimately arrived at a finding that unless the genuineness of Exhibit B.4 is found out, the prayer in the suit cannot be decided.

9. Pending first appeal, the plaintiffs have filed I.A.No.1 of 2019 to refer Exhibit B.4 Will to Government Forensic expert to compare the signature found in the said document with that of Exhibit A.1 Will. The said application was allowed by the first appellate Court and thereafter, the first appellate Court remitted the matter back to the trial Court directing the trial Court to send Exhibit B.4 Will for expert opinion and permit both the parties to let in evidence after framing proper issues and pass orders. The said order of remand is under challenge in the present appeal.



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10. The learned senior counsel appearing for the appellant had contended that the first appellate Court ought not to have allowed the application, namely I.A.No.1 of 2019 when there is no plea of forgery before the trial Court. He further contended that when Exhibit A.1 is only a registration copy, the question of comparing a registration copy of Exhibit A.1 with Exhibit B.4 Will does not arise. The learned senior counsel for the appellant further contended that the suit was pending from the year 2010 onwards and the first appellate Court has passed an order of remand in the year 2019 without any proper reasons.

11. The learned counsel for the appellant had further contended that when the plaintiffs have not chosen to send Exhibit B.4 for an expert opinion, pending trial, the first appellate Court ought not to have granted a second opportunity to the plaintiffs. He further contended that when the entire oral and documentary evidence is available before the first appellate Court, the first appellate Court ought not to have remitted the matter back to the trial Court. He further contended that the appellant had raised substantial questions of law in the present appeal and therefore, this Court without remitting the matter back to the trial Court may allow the appeal and dismiss the suit on the ground that the plaintiff has not established his case.



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12. Per contra, the learned counsel appearing for the respondent/plaintiff had contended that in Paragraph No.5 of the plaint, a specific pleading has been raised that the said Grace Asirvatham did not have any title to the property and the alleged document is a rank forgery and brought about by impersonation and playing fraud on registration. He further contended that the trial Court has erroneously cast the burden upon the plaintiffs to disprove Exhibit B.4 Will. Both the parties admitted that Exhibit A.1 Will has been executed by Glory Arthur. The only dispute is whether the said Will was cancelled by a subsequent unregistered Will, dated 05.12.1973 or not. Therefore, the entire burden is upon the defendants to establish the genuineness and validity of Exhibit B.4 Will and prove the same in accordance with Section 68 of the Indian Evidence Act.

13. The learned counsel for the respondent had further contended that Exhibit A.1 Will in favour of the plaintiff's husband is a registered Will and the said Will is said to have been cancelled by way of an unregistered Will, dated 05.12.1973 marked as Exhibit B.4. Therefore, the entire burden is upon the 1st defendant who is the propounder of the Will, to remove all the suspicious circumstances and establish the



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genuineness and validity of the said Will. The trial Court had relied upon the evidence of deposition of D.W.2 who is the attestor of the Will and has arrived at a finding that the defendants have proved Exhibit B.4 Will. On the other hand, the first appellate Court has found that it is not satisfied with the deposition of D.W.2. The first appellate Court has further found that there are various suspicious circumstances surrounding Exhibit B.4 Will. He further contended that unless a specific issue had been framed by the trial Court with regard to the genuineness and validity of Exhibit B.4 Will, both the parties would not be in a position to let in proper evidence. Therefore, the first appellate Court was right in remitting the matter back to the trial Court.

14. The plaintiffs have filed I.A.No.1 of 2019 in order to compare Exhibit B.4 with Exhibit A.1. The original document has to be sent to the Government expert through an Advocate Commissioner and the expert has to depose with regard to his opinion. Then both the parties will have an option to let in further oral or documentary evidence as the case may be. Therefore, the first appellate Court was right in remitting the matter back to the trial Court invoking the provisions of Order 41 Rule 23 of Code of Civil Procedure. Therefore, he prayed for dismissing the appeal.



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15. I have carefully considered the submissions made on either side and perused the records.

16. Both the parties admit that the suit schedule property belongs to one Glory Arthur by way of a registered sale deed, dated 28.01.1938. Both the parties also admit that the said Glory Arthur has executed Exhibit A.1 Will on 26.06.1969 in which she has bequeathed first schedule property in favour of another relative and the second schedule property in favour of the 1st plaintiff's husband. It is the case of the plaintiffs that Exhibit A.1 Will is the last Will of the deceased Glory Arthur. However, the 1st defendant who is the brother of the 1st plaintiff's husband claims that the said Glory Arthur has executed an unregistered Will on 05.12.1973 (Exhibit B.4) wherein she has bequeathed the entire property in favour of her elder sister's daughter Grace Asirvatham.

17. Based upon Exhibit B.4 Will, the said Grace Asirvatham is said to have executed two settlement deeds on 15.06.1984 in favour of the 1st defendant. In turn, the 1st defendant has executed a registered sale deed in favour of defendants 2 to 5 on 21.07.2000 under Exhibit A.2. Therefore, the only issue that arises between the parties is to the



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genuineness and validity of Exhibit B.4 Will, dated 05.12.1973.

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18. The trial Court after considering the deposition of D.W.2 who is one of the attestors of Exhibit B.4 Will, has arrived at a finding that Exhibit B.4 Will has been proved. The first appellate Court has raised various doubts with regard to the deposition of D.W.2 and also the manner in which Exhibit B.4 is said to have been executed by the testator. Due to entertainment of such a doubt, the first appellate Court had allowed I.A.No.1 of 2013 filed by the appellant/plaintiff to refer Exhibit B.4 Will for an expert opinion to be compared with Exhibit A.1 Will, which is an admitted document.

19. The first appellate Court after having entertained so much of doubt with regard to the deposition of D.W.2 and the manner of execution of Exhibit B.4, it should have proceeded to decide the appeal on merits. However, in order to clear the doubts in entirety, the first appellate court has chosen to refer the document for an expert opinion. However, it could be seen from the records that the original of Exhibit A.1 has not been produced by the plaintiffs, but only a registration copy has been produced. Therefore, it will be impossible for the expert to compare the signature of Glory Arthur in Exhibit A.1 with that of her signature in



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Exhibit B.4. Consequently, the first appellate Court was not right in allowing I.A.No.1 of 2019 for comparing Exhibit B.4 with Exhibit A.1.

All the substantial questions of law have been raised only with regard to allowing of the said Interlocutory Application. No substantial question of law has been framed touching upon the merits of the suit. Therefore, this Court is not inclined to accept the contentions of the learned senior counsel appearing for the appellants that this Court may treat the miscellaneous appeal as a second appeal and decide the suit on merits. That apart, no Court fee has been paid in the C.M.A for treating it as a second appeal.

20. The learned senior counsel had relied upon a judgment of the Hon'ble Supreme Court reported in **2021 (11) SCC 277 (Shivakumar & Others Vs. Sharanabasappa & Others)**. Paragraph No.26.3 and 26.4 are extracted as follows:

“26.3. A comprehension of the scheme of the provisions for remand as contained in Rules 23 and 23-A of Order 41 is not complete without reference to the provision contained in Rule 24 of Order 41 that enables the appellate Court to dispose of a case finally without a remand if the evidence on record is sufficient; notwithstanding that the appellate Court proceeds on a



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ground entirely different from that on which the trial court had proceeded.

26.4. A conjoint reading of Rules 23, 23-A and 24 of Order 41 brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an appellate Court is to follow the mandate of Rule 24 of Order 41 CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a retrial is considered necessary that the appellate Court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. An order of remand only on the ground that the points touching the appreciation of evidence were not dealt with by the trial court may not be considered proper in a given case because the first appellate Court itself is possessed of jurisdiction to enter into facts and appreciate the evidence.”

21. A perusal of the judgment of the Hon'ble Supreme Court will make it clear that when the available evidence is sufficient to dispose of the matter, the first appellate Court is expected to follow Order 41 Rule



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24 of Code of Civil Procedure and to determine the suit finally. Only in cases where retrial is considered necessary, the first appellate Court shall adopt the course of remanding the case. In the present case, the suit has not been decided by the trial Court on a preliminary issue. Therefore, the first appellate Court ought to have invoked Order 41 Rule 24 of Code of Civil Procedure and should have disposed of the appeal on merits. Merely for the purpose of re-appreciation of evidence, the appeal cannot be remitted to the trial Court.

22. The Hon'ble Supreme Court in a judgment reported in **2015 (11) SCC 782 (Lisamma Antony & Another Vs. Karthiyayani & Another)** in Paragraph No.16 and 17 as held as follows:

“16. Rule 24 of Order 41 of the Code further provides that where evidence on record is sufficient, the appellate Court may determine the case finally, instead of remanding the same to the lower Court.

17. Needless to say, in the present case, the suit was not disposed of on any preliminary issue by the trial Court, The second appellate Court should have restrained itself from remanding a case to the trial court. Remanding a case for reappreciation of evidence and fresh decision in the matter like the present one is nothing but harassment of the litigant. The unnecessary delay in final disposal of a lis,



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shakes the faith of litigants in the Court.”

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23. In view of the judgment of the Hon'ble Supreme Court, the first appellate Court has got all powers to re-appreciate the entire evidence on record. In fact, it is a final Court of facts. Therefore, if there is any error on the part of the trial Court in appreciating the oral or documentary evidence, it has to be re-appreciated by the first appellate Court and arrive at a different finding based upon the existing oral and documentary evidence.

24. The first appellate Court has passed an order of remand also on the ground that the trial Court has not framed any issue with regard to the genuineness and validity of Exhibit B.4 Will. The genuineness of the said Will has been questioned by the plaintiff. A perusal of evidence of P.W.1, D.W.1 and D.W.2 will clearly indicate that the parties have understood the real dispute and let in evidence with regard to the genuineness and validity of Exhibit B.4 Will. The trial Court has also elaborately considered the said aspect in paragraph nos.13 and 14 of its judgment. When the parties have clearly understood the case and have let in oral and documentary evidence, on a mere ground that no specific issue was framed by the trial Court, the appeal cannot be remitted back to



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the trial Court unless any one of the parties have expressed that it has caused prejudice to them. In the present case, admittedly neither the plaintiff nor the defendant have expressed any prejudice in view of non-framing of an issue relating to Exhibit B.4 document. Therefore, the first appellate Court was not right in remitting the matter back to the trial Court on the ground of non-framing of a specific issue relating to Exhibit B.4 Will.

25. Pending appeal, the appellants have filed C.M.P(MD)No.3355 of 2023 under Order 41 Rule 27 of Code of Civil Procedure. The said application has been filed to mark the original of two settlement deeds, dated 15.06.1984. Before the trial Court, the defendant has already marked the registration copies of these two documents as Exhibits B.13 and B.14. The issue between the parties is that whether Exhibit B.4 Will has been proved in accordance with Section 68 of the Indian Evidence Act or not. Once Exhibit B.4 is not proved, Exhibits B.13 and B.14 will have no legs to stand. In case, if Exhibit B.4 is proved, thereafter, the property becomes the absolute property of Grace Asirvatham. Unless the 1st respondent proves Exhibits B.13 and B.14, he has to share the property along with his brother Prem Kumar Asirvatham. Therefore, production of originals of Exhibits B.13 and B.14 are very much



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essential for deciding the suit. It could be seen that already these two documents have been marked before trial Court as Exhibits B.13 and B.

14. Therefore, no prejudice would be caused to the plaintiffs, if the originals of these two documents are marked. However, these two documents cannot be marked before this Court unless the procedure contemplated under Order 41 Rule 28 is followed. Therefore, C.M.P(MD)No.3355 of 2023 is closed and the registry is directed to return the original documents to the learned counsel for the appellants. The appellants are at liberty to file an application before the first appellate Court for receiving the said documents after following the procedure as laid down by the Hon'ble Supreme Court in a judgment reported in **2018 (9) SCC 445 (Corporation of Madras & Another Vs. M.Parthasarathy & Others)**.

26. The order of the first appellate Court in I.A.No.1 of 2019 is not legally sustainable in view of the fact that Exhibit B.4 cannot be compared with the registration copy of Exhibit A.1. Therefore, the order passed by the first appellate Court in I.A.No.1 of 2019 is hereby set aside. It is settled position of law that the propounder / beneficiary of the Will has to establish the genuineness and validity of the Will after clearing all the suspicious circumstances. Therefore, the entire burden is upon the 1st defendant or his legal heirs to prove the Will in accordance



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with Section 68 of the Indian Evidence Act and Section 63 of Indian Succession Act.

27. In view of the above said deliberations, this Court passes the following order:

(i) The order of remand passed by the first appellate Court 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 after giving due opportunity to both the parties.

(ii) The additional documents filed by the appellant herein in C.M.P(MD)No.3355 of 2023 can be placed before the first appellate Court by following the procedure under Order 41 Rule 27 and Order 41 Rule 28 of Code of Civil Procedure, if they are so advised.

(iii) The appellants/defendants are at liberty to file an application for comparing the signature under Exhibit B.4 with any other admitted contemporaneous documents containing the signature of Glory Arthur, if they are so advised.



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(iv) The appeal shall be disposed of by the first

appellate Court as expeditiously as possible.

28. In view of the above said observations, this Civil Miscellaneous Appeal stands allowed. Consequently connected Civil Miscellaneous Petitions are closed. No costs.

01.06.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No

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To

- 1.The IV Additional District Court,
Tirunelveli.
- 2.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR ,J.

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Pre-delivery order made in
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