



C.M.A.(MD).No.230 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.230 of 2018

and

C.M.P(MD) No.3434 of 2018

1. M.Ganapathy

2. M.Mythili

..... Appellants/

Respondents 1 and 2/ Defendants 1 and 2

-vs-

1. M.Chinnaiyan

2. A.Nagarathinam

3. N.Suganthan

4. Minor Visali

5. R.Gunasundari

6. R.Moganasundari

7. R.Ezhilarasi

8. R.Rajkumar

9. Nagaraj

10. Arivuselvan

11. Ezhilarasan

12. Anandaraj

13. Murugaraj

14. Ambal Lakshmi

... 1st Respondent /Appellant/Plaintiff

.... Respondents 2 to 14/ Respondents 3 to 15
/ Defendants 3 to 15

(R2 to R-14 herein are set -exparte
by the Courts below. Hence, notice may be
given up against R-2 to R-14)



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PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1 (U) of Code of Civil Procedure, against the order of remand passed by the learned II- Additional District and Sessions Judge, Thanjavur, in A.S.No.52 of 2016, dated 25.01.2017, by which, setting aside the judgment and decretal order, dated 10.03.2016, made in O.S.No.140 of 2012 passed by the learned Principal Subordinate Judge, Thanjavur.

For Appellants : Mr.S.Deenadhayan

For Respondents : Mr.K.G.Arunkumar – for R1
: for R2 to R-14- Ex-parte

J U D G M E N T

The defendants in a suit for partition is the appellants. The plaintiff viz., the first respondent herein had filed O.S.No.140 of 2012, on the file of the Principal Subordinate Court, Thanjavur, for the relief of partition and separate possession claiming 1/5th share in the suit schedule properties. Survey No.114/2B2 is shown as the suit schedule property, having an extent of five cents with four coconut trees. The defendants in the suit had raised certain dispute with regard to identity of the property and therefore, the defendants have filed a written statement disputing the entitlement of the plaintiff for partition.



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2. The trial Court, after considering Ex.A1 to Ex.A.48 and Ex.B1 to Ex.B9 and the evidence of P.W.1 to P.W.3 and D.W.1 to D.W.3, had dismissed the suit in its entirety. Aggrieved over the same, the plaintiff has filed A.S.No. 52 of 2016, on the file of the II Additional District and Sessions Court, Thanjavur. The learned Subordinate Judge had remanded the matter back to the trial Court for the purpose of proper identification of the suit property. This order of remand is under challenge in the present appeal filed by the defendants.

3. According to the learned counsel appearing for the appellants/ defendants, in a suit for partition, the plaintiff has to establish that the suit schedule property is a joint family property and he is entitled to have the share in the suit schedule property. The question of identification of the suit schedule property would not arise. Therefore, for the purpose of identify the suit schedule property, the first appellate Court ought not to have remitted the matter back to the trial Court.



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4. Per contra, the learned counsel appearing for the first respondent had contended that in the written statement, the defendants have raised a plea that the four boundaries of the property shown in the plaint are erroneous and he had also disputed the survey number and has also contended that the suit property in S.No.114/2B2 is erroneous. In view of the said written statement, an Advocate Commissioner was appointed and he was also examined as P.W.

3. Therefore, the first appellate Court was right in arriving at a conclusion that the plaintiff, having not established to identity the suit schedule property, it is all the more required to be remitted to the trial Court for the purpose of proper identification of the suit schedule property. Hence, he prayed for dismissing the appeal and confirming the order of remand.

5. I have carefully considered the submissions made by the learned counsel on either side.

6. The plaintiff had filed a suit for partition with a specific stand that the suit schedule property viz., S.No.114/2B2 having an extent of 5 cents is a joint family property between himself and his brother Ganapathy and he is entitled to 1/5th share in the said suit schedule property. Therefore, the entire



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burden is upon the plaintiff to establish that the the said survey number is a joint family property and he is entitled to 1/5th share. The question of identification and location of the suit schedule property, even if it is raised by the defendants, it is upon the plaintiff to establish the same. At the instance of the plaintiff, an Advocate Commissioner was appointed and he has also filed report and he was examined as P.W.3. Based upon the said report, and the other oral and documentary evidence, the trial Court had found that the plaintiff has not established his case and proceeded to dismiss the appeal.

7. The first appellate Court had remitted the matter back to the trial Court only on the ground that an Advocate Commissioner has to be appointed along with a Surveyor to identify whether the suit schedule property is located in suit survey number or in a different survey number. This is completely alien to a suit for partition at the preliminary decree stage. The plaintiff has to establish by way of oral and documentary evidence that the suit schedule property is a joint family property, for which, a survey cannot be conducted. However, the Commissioner has already been appointed by the trial Court and his report is already been on record. Though, that it not been marked, he has been examined as P.W.3. In such circumstances, the first



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appellate Court is not right in remitting the matter back to the trial Court. Therefore, the order of remand is not legally sustainable. The appeal is allowed and the matter is remitted back to the file of the first appellate Court. The first appellate Court is directed to decide the appeal on merits and in accordance with law, based upon the oral and documentary evidence which are already on record.

8. With the above said observations, this Civil Miscellaneous Appeal is allowed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

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

1. The II- Additional District and Sessions Judge,
Thanjavur.
2. The Principal Subordinate Judge,
Thanjavur.
3. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR,J.

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