



C.M.A.Nos.509 and 531 of 2021

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED: 17.04.2024

CORAM:

**THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE**

**C.M.A. Nos.509 and 531 of 2021 and**  
**C.M.P. Nos.3351 and 3379 of 2021**

1.Usha Rani  
2.Chidambaram .. Appellants in C.M.A. No.509 of 2021

1.Chidambaram  
2.Usha Rani .. Appellants in C.M.A. No.531 of 2021

Vs.

1.Thulasi  
2.Moraraji  
3.Sangeetha .. Respondents in both appeals

Prayer in both appeals: Civil Miscellaneous Appeals filed under Order 43 Rule 1(u) of C.P.C. against the judgment and decree dated 28.08.2019 made in A.S. Nos.25 & 24 of 2016 on the file of the Principal Sub Judge, Krishnagiri in reversing the well considered judgment and decree in I.A. Nos.733 & 443 of 2013 in O.S. No.134 of 2004 on the file of the District Munsif, Krishnagiri dated 31.03.2016.

For Appellants in both appeals : Ms.B.S.Mitraneghaa

For Respondents in both appeals : Mr.V.Nicholas



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## **JUDGMENT**

These appeals have been filed, challenging the order of remand passed by the Lower Appellate Court, viz. the Principal Subordinate Court, Krishnagiri dated 28.08.2019 in A.S. Nos.24 and 25 of 2016.

2.The second appellant in C.M.A. No.509 of 2021 and the first appellant in C.M.A. No.531 of 2021 is the plaintiff in the suit. The first appellant in C.M.A. No.509 of 2021 and the second appellant in C.M.A. No.531 of 2021 is the fifth defendant in the suit. The respondents are defendants 2 to 4 in the suit. The parties in these appeals are claiming to be the legal heirs of the deceased Thangavel, from whom they claim to have derived title over the suit schedule properties.

3.The plaintiff filed a suit for partition, claiming 1/5th share in the suit schedule properties. The Trial Court, by judgment and decree dated 27.02.2008 passed in O.S. No.134 of 2004, dismissed the suit for partition filed by the plaintiff. Aggrieved by the same, the plaintiff in the suit, filed an Appeal Suit in A.S.No.11 of 2008 on the file of the



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Principal Subordinate Court, Krishnagiri. By judgment and decree dated 09.01.2009, passed in A.S. No.11 of 2008, the Principal Subordinate Court, Krishnagiri, reversed the findings of the Trial Court and granted a preliminary decree in favour of the plaintiff as prayed for in the suit insofar as item Nos.1, 2 and 4 of the suit schedule properties are concerned. Aggrieved by the same, the deceased Thangavel and the defendants 2 to 4 filed a Second Appeal before this Court in S.A. No.589 of 2009. Pending the Second Appeal, the deceased Thangavel died. By judgment and decree dated 02.11.2012, the Second Appeal filed by the defendants 2 to 4 came to be dismissed. In the said Second Appeal, the defendants 2 to 4 have conceded that there was no Will executed by the late Thangavel. Thereafter, the plaintiff filed an Interlocutory Application in I.A. No.443 of 2013 on the file of the District Munsif Court, Krishnagiri for passing final decree through appointment of an Advocate Commissioner, in terms of the preliminary decree granted in his favour. Similarly, the fifth defendant, who is sailing with the plaintiff, also filed an Interlocutory Application in I.A. No.733 of 2013 before the District Munsif Court, Krishnagiri for passing final decree.



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4.Counter affidavits were filed by the defendants 2 to 4 in both the applications. Admittedly, in the said counter affidavits, once again they have not pleaded that there is a Will executed by the late Thangavel. By an order dated 31.03.2016 in the final decree applications filed by the appellants in I.A. Nos.443 and 733 of 2013, the District Munsif Court, Krishnagiri appointed an Advocate Commissioner as prayed for in the respective applications. Aggrieved by the same, the defendants 2 to 4 preferred an Appeal Suit in A.S. Nos.24 and 25 of 2016 on the file of the Principal Subordinate Court, Krishnagiri. In the Appeal Suits, for the first time, the defendants 2 to 4 had pleaded that there is a Will executed by the late Thangavel. By the impugned common judgment dated 28.08.2019, the Principal Subordinate Judge, Krishnagiri in A.S. Nos.24 and 25 of 2016 has remanded the matter back to the Trial Court for fresh consideration, based on the alleged Will, which was allowed to be received as a document in I.A. No.13 of 2018 under Order 41 Rule 27 of C.P.C. Aggrieved by the order of remand dated 28.08.2019 passed in the common judgment in A.S. Nos.24 and 25 of 2016 on the file of the Principal Subordinate Court, Krishnagiri, these appeals have been filed.



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5.Learned counsel for the appellants drew the attention of this Court to the observations recorded in the judgment rendered by this Court on 02.11.2012 in the Second Appeal in S.A. No.589 of 2009 and would submit that the defendants 2 to 4 have themselves conceded before this Court that there is no Will executed by the late Thangavel. Therefore, she would submit that the Principal Subordinate Court, Krishnagiri under the impugned common judgment dated 28.08.2019 passed in A.S. Nos.24 and 25 of 2016 has passed an erroneous order of remand, based upon the fabricated Will produced by the defendants 2 to 4 for the first time before the Lower Appellate Court in A.S. Nos.24 and 25 of 2016 despite the fact that the defendants 2 to 4 have conceded before this Court in S.A. No.589 of 2009 that there was no Will executed by the late Thangavel. She would also submit that since the judgment and decree dated 02.11.2012 passed by this Court in S.A. No.589 of 2009 has attained finality, by sheer abuse of process of Court and law, the defendants 2 to 4 have introduced a fabricated Will for the first time before the Principal Subordinate Court, Krishnagiri in A.S. Nos.24 and 25 of 2016 and the Lower Appellate Court, has erroneously by total non-



application of mind to the fact that the judgment rendered in S.A. No.589 of 2009 by this Court has attained finality, passed an order of remand.

Hence, she would submit that the order of remand has to be set aside by this Court and these appeals will have to be allowed.

6.On the other hand, the learned counsel for the respondents would submit that the present appeals are not maintainable under Order 43 Rule 1(u) of the C.P.C. According to him, only if the case involves a substantial question of law, an appeal is maintainable as against the order of remand. In support of his submissions, he drew the attention of this Court to the judgment of the Hon'ble Supreme Court in the case of Narayanan vs. Kumaran and others reported in (2004) 4 SCC 26 and in particular, he referred to paragraphs Nos.17, 22, 23, 24 and 29 of the said judgment.

7.In order to elaborate as to what is the substantial question of law as per Section 100 of Civil Procedure Code, the learned counsel for the respondents drew the attention of this Court to the judgment of the Hon'ble Supreme Court in the case of Chandrabhan (deceased) through



WEBCOPY LRs and others vs. Saraswati and others reported in AIR 2022 SC 4601 and in particular, he referred to paragraph Nos.31 and 32.

8.Discussion:

The following are the un-disputed facts:

a)A preliminary decree has been passed in favour of the appellants as prayed for in the suit in O.S. No.134 of 2004 on the file of the District Munsif Court, Krishnagiri, by the judgment of the Principal Subordinate Court, Krishnagiri dated 09.01.2009 in A.S. No.11 of 2008 and the said preliminary decree has also attained finality by the judgment of this Court dated 02.11.2012 passed in S.A. No.589 of 2009;

b)In the Second Appeal in S.A. No.589 of 2009 filed by the defendants 2 to 4 before this Court, they have conceded that the deceased Thangavel has not executed any Will, which has also been recorded in the judgment dated 02.11.2012;

c)In the counter affidavit filed by the defendants 2 to 4 in I.A. Nos.443 and 733 of 2013 before the District Munsif Court, Krishnagiri in the final decree applications filed by the plaintiff and the fifth defendant,



they have not pleaded that there is a Will executed by late Thangavel;

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d)A Review Application filed by the defendants 2 to 4 to review the judgment dated 02.11.2012 in S.A. No.589 of 2009 also came to be dismissed on 19.03.2018 though in the said Review Application, a reference was made about the existence of the Will for the first time. The preliminary decree passed as prayed for in O.S. No.134 of 2004 has also attained finality and till date, the same has not been challenged by the defendants 2 to 4;

e)The Lower Appellate Court under the impugned common judgment has not taken note of the fact that the preliminary decree passed in favour of the plaintiff and the fifth defendant will continue to remain even if the Trial Court on remand may deem it fit to dismiss the final decree applications filed by the plaintiff and the fifth defendant;

f)Since the defendants 2 to 4 have not challenged the preliminary decree for partition passed in favour of the plaintiff and the fifth defendant and the said preliminary decree having attained finality by virtue of the judgment dated 02.11.2012 passed by this Court in S.A. No.589 of 2009, the question of remanding the final decree applications for fresh consideration will not arise as the preliminary decree for



partition will continue to remain as it has attained finality;

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g)Originally, the suit was filed in the year 2001 and only in the Review Application seeking to review the judgment dated 02.11.2012 passed in S.A. No.589 of 2009, the defendants 2 to 4 had admittedly pleaded about the existence of a Will despite their own admission earlier in the Second Appeal that there was no Will existing.

9.Learned counsel for the respondents has questioned the maintainability of these appeals under Order 43 Rule 1(u) of the C.P.C. by relying upon the judgments, referred to supra as he would submit that only if there is a substantial question of law, as per Section 100 of C.P.C., an order of remand can be challenged before this Court by filing an appeal. In the decisions relied upon by the learned counsel for the respondents, referred to supra, the meaning of substantial question of law has been interpreted. According to the Hon'ble Supreme Court, the proper test for determining whether a question of law raised in the case is substantial or not would be, whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so, whether it is either an open question in the sense that they are not



finally settled by this Court. The relevant paragraphs of the decision relied upon by the learned counsel for the respondents in the case of Chandrabhan (deceased) through LRs and others vs. Saraswati and others reported in AIR 2022 SC 4601 is re-produced hereunder:

*'31.The proper test for determining whether a question of law raised in the case is substantial would be, whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by this Court. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or the question raised is palpably absurd, the question would not be a substantial question of law.*

*32.To be 'substantial', a question of law must be debatable, not previously settled by law of the land or a binding precedent and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first, a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An*



*entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. If will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.'*

10.Undoubtedly, in the instant case, the findings of the impugned common judgment and decree affects the rights of the appellants, who are the plaintiff and the fifth defendant in the suit. As the respondents have questioned the entitlement of the appellants as prayed for in the preliminary decree despite the fact that the said preliminary decree for partition has attained finality by the judgment dated 02.11.2012 passed in the Second Appeal by this Court in S.A. No.589 of 2009, the act of the respondents, without challenging the preliminary decree for partition, which has attained finality, in introducing a Will by which they claim rights over the suit properties, despite they themselves having conceded before this Court in S.A. No.589 of 2009 that there is no Will existing,



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will amount to abuse of process of Court and law. The test required as laid down by the decision, relied upon by the learned counsel for the respondents in Chandrabhan (deceased) through LRs and others v. Saraswati reported in AIR 2022 SC 4601 has been fully satisfied by the appellants in these present appeals. By total non-application of mind to the findings of this Court rendered in the judgment dated 02.11.2012 passed in S.A. No.589 of 2009, the Lower Appellate Court in the impugned judgment has entertained the appeals filed by the defendants 2 to 4 and has passed the order of remand despite the fact that the preliminary decree for partition passed in the suit has already attained finality.

11.For the foregoing reasons, the impugned judgment and decree has to be set aside by this Court and these appeals will have to be allowed. Accordingly, the impugned judgment and decree dated 28.08.2019 passed by the Principal Subordinate Court, Krishnagiri in A.S. Nos.24 and 25 of 2016 are set aside by this Court and these appeals are allowed as prayed for. No costs.

17.04.2024



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To

- 1.The Principal Sub Judge,  
Krishnagiri.
- 2.The District Munsif,  
Krishnagiri.
- 3.The Section Officer,  
V.R. Section,  
High Court, Madras.



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**ABDUL QUDDHOSE, J.**

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