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C.M.A.No.3420 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.04.2024

CORAM

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

C.M.A. No.3420 of 2017 and
C.M.P. Nos.21693 of 2017 & 615 of 2022

1.K.Muthusamy Konar
2.M.Loganthan
3.M.Jayakumar

... Appellants

Vs.

1.K.Subramaniam (Died)
2.Kalamani
3.Palaniammal
4.Thilakamani
5.Rajamanickam
6.Rajeshwari
7.Tamilselvi
8.Bhuvaneswari
9.Minor Sowndarya
10.Minor Sahana
(Respondent Nos.9 and 10 rep. by
their Natural Guardian and Mother
Bhuvaneshwari)
(Respondent Nos.3 to 10 brought on record
as LR's of the deceased R1 viz., K.Subramaniam
vide Court Order dated 11.07.2023 made in
C.M.P.Nos.615 to 617 of 2022 in
C.M.A.No.3420 of 2017 by KRSJ)

... Respondents



PRAYER: Civil Miscellaneous Appeals filed under Section 104 read with Order XLIII Rule 1 (U) of C.P.C. against the Judgment and Decree dated 10.10.2017 made in A.S.No.84 of 2013 on the file of the Principal District Judge, Coimbatore, remanding the Judgment and Decree dated 25.07.2013 made in O.S.No.666 of 2010 on the file of the III Additional Sub Court, Coimbatore.

For Appellants : Mr.P.Saravana Sowmiyan

For Respondents : R1 - Died
R2 - Exparte Notice Dispensed with
Mr.T.M.Haribaran
for R3 to R10

JUDGMENT

This appeal has been filed, challenging the judgment and decree dated 10.10.2017 passed by the Principal District Judge, Coimbatore in A.S.No.84 of 2013 and I.A.Nos.49 and 50 of 2014 in A.S.No.84 of 2013.

2.The first appellant and the first respondent in the Appeal Suit are brothers. The respondent Nos.2 to 4 in the Appeal Suit are the children of the first respondent in the Appeal Suit. The first respondent herein/plaintiff filed the suit for partition against the defendants and the second respondent herein. The first appellant and the first respondent are the children of late



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Kalimuthu Konar. The first respondent herein/plaintiff claimed right over the suit schedule property based on inheritance from late Kalimuthu Konar. The suit was filed for half share in the suit schedule property. However, the defendants claimed that they are the absolute owners of the suit schedule property having got the same by virtue of a Will executed by late Kalimuthu Konar. The Trial Court viz., III Additional Sub Court, Coimbatore by its judgment and decree dated 25.07.2013 in O.S.No.666 of 2010, dismissed the suit on the ground of non joinder of necessary parties and on the ground that the Will has been proved by the defendants.

3. Aggrieved by the judgment and decree dated 25.07.2013 passed in O.S.No.666 of 2010, the plaintiff in the suit, who is the first respondent in this appeal preferred an Appeal Suit in A.S.No.84 of 2013 on the file of the Principal District Judge, Coimbatore. The Principal District Judge, Coimbatore by the impugned judgment and decree dated 10.10.2017 passed in A.S.No.84 of 2013 set aside the judgment and decree of the Trial Court dated 25.07.2013 passed in O.S.No.666 of 2010 and remanded the matter back to the Trial Court for a *de novo* trial by giving the following reasons:



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- a) The defendants have not proved the Will in accordance with law;
- b) Since necessary parties were not arrayed as party defendants in the suit, the matter will have to be remanded back to the Trial Court for *de novo* trial.

4.Learned counsel for the appellants would submit that if *de novo* trial is conducted, there is a chance for the respondents to fabricate documents and create new evidence, which should not be allowed. According to him, the judgment and decree passed by the lower appellate Court is erroneous and has to be set aside by this Court.

5.On the contrary, the learned counsel for the respondents would submit that the Will, alleged to have been executed in favour of the defendants, is a fabricated document and the lower appellate Court has rightly come to the conclusion that the Will has not been proved by the defendants. Therefore, according to him, there is no scope for interference of the impugned judgment and decree dated 10.10.2017 passed in A.S.No.84 of 2013 by this Court.



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6. Admittedly, the dispute is between siblings. The plaintiff is the brother of the first defendant. The defendant Nos.2 to 4 are the children of the first defendant. The plaintiff and the first defendant are children of late Kalimuthu Konar. The plaintiff in the suit claims by way of inheritance and he claims that he is entitled to 50% share in the suit schedule property along with the first defendant who is his own brother. In the written statement, the defendants had taken a plea that the suit is liable to be dismissed for non joinder of necessary parties.

7. The Trial Court, while dismissing the suit, has given a finding that the suit has to be dismissed for non joinder of necessary parties. However, the Trial Court has held that the Will standing in favour of the defendants and executed by late Kalimuthu Konar has been proved by the defendants.

8. Aggrieved by the said findings, the plaintiff had preferred first appeal in A.S.No.84 of 2013. Since the plaintiff has not arrayed the necessary parties as party defendants in the suit and there is a doubt with regard to the genuineness of the Will, the lower Appellate Court has set aside the findings of the Trial Court and has remanded the matter back to



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the Trial Court for *de novo* trial. Admittedly, the dispute is between siblings and family members and the suit filed by the plaintiff is a partition suit. The judgment and decree which is under challenge in this appeal is dated 10.10.2017. The appellants if they had accepted for remand as per the impugned judgment and decree, by now, the trial itself would have got completed and a judgment would have been passed by the Trial Court. Instead the appellants have filed this appeal. If the appellants are confident of success in the suit instead of prosecuting this appeal, they could have very well gone before the Trial Court by complying with the order of remand passed by the lower appellate Court under the impugned judgment and decree dated 10.10.2017. This Court has also taken into consideration the fact that the dispute is between the siblings. Both the siblings who are parties to the dispute are the children of late Kalimuthu Konar.

9. For the foregoing reasons, this Court cannot entertain this appeal, that too after a lapse of almost seven years from the date of the impugned judgment and decree, which has only directed the parties to go for *de novo* trial by passing a remand order. The only relief that can be granted by this Court to the appellants in this appeal is to direct the Trial Court to dispose



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of the suit within a time frame to be fixed by this Court considering the fact that the suit filed by the first respondent herein is of the year 2010. Since the defendants have already examined one of the alleged attesting witness (DW3) to the Will, while passing the judgment and decree, the Trial Court shall consider the evidence of DW3 as well.

10. In the result, this appeal is disposed of by confirming the findings of the lower appellate Court in its judgment and decree dated 10.10.2017 passed in A.S.No.84 of 2013 and by directing the Trial Court viz., III Additional Sub Court, Coimbatore to dispose of the suit in O.S.No.666 of 2010 within a period of six months from the date of receipt of a copy of this judgment. No Costs. Consequently, the connected Miscellaneous Petitions are closed.

15.04.2024

Index : Yes/No
Speaking Order : Yes / No
Neutral Citation Case: Yes / No
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To

1. The Principal District Judge, Coimbatore.
2. The III Additional Sub Court, Coimbatore.
3. The Section officer, Record Section, High Court of Madras.



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ABDUL QUDDHOSE. J.,

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