
(2008) 02 MAD CK 0167
In the Madras High Court
Case No : C.M.A. No. 2534 of 2005

P. Chandran and 6 others

APPELLANT

Vs

Devaki and Others

RESPONDENT

Date of Decision : 12-02-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 3, Order 41 Rule 23, Order 41 Rule 23A, Order 41 Rule 31, 151

Citation : (2008) 02 MAD CK 0167

Hon'ble Judges : R. Banumathi, J

Bench : Single Bench

Advocate : M. Chidambaram, for the Appellant; Sujatha Rangarajan for respondents 3 to 6, No appearance for respondents 1 and 2, Mr. Adhinarayanan for R-7, for the Respondent

Judgement

R. Banumathi, J.—Being aggrieved by the Judgment and Decree in A.S. No. 28/2004, remanding the partition suit to the trial Court, the plaintiffs have preferred this appeal. For convenience, parties are referred to as per their array in the original suit. Parties are related as under:-

2. Case of plaintiff's in brief is as follows :-

Govindaraju was employed as Deputy Controller of Exports and Imports, Government of India, Mumbai. Govindaraju and Devaki [R-1] had no issues. Govindaraju died on 14.01.1985. After his death, the first Respondent and deceased plaintiff are Class I Heir as per Hindu Succession Act. During his life time, Govindaraju had purchased a plot in Anna Nagar - suit property Item No. 1 and he had commenced construction of the house in the said plot. At the stage of completion of construction of the said building, Govindaraju died at Mumbai. Govindaraju and first respondent had no issues out of the wedlock. The second respondent is the daughter of one Krishnan of Ambur town and she has nothing to do with Govindaraju. But the first Respondent has been claiming that the second Respondent is the adopted daughter of Govindaraju and the first

Respondent.

3. After the death of Govindaraju, Ammini Animal, being class 1 Heir is entitled to half share. There was panchayat and mediation to effect amicable partition. The first respondent refused to effect partition allotting half share to the Ammini Ammal and she had filed suit CS. No. 429/1988 before the High Court Madras for partition of her half share and delivery of possession.

4. During the pendency of the suit, Ammini Ammal died. She had executed a registered Will Doc. No. 149/1992 dated 17.12.1992 in Sub Registrar Office, Ambur. Under the said Will, she had bequeathed her undivided share in the suit property to her four sons/plaintiffs 1 to 3 and deceased Thangaraj. After the commencement of pecuniary jurisdiction, the suit was transferred to City Civil Court and renumbered as O.S. No. 4710/1996. After death of Ammini Ammal, plaintiffs were impleaded as Legal Representatives of deceased Ammini Ammal.

5. The Defendants 1 and 2 contested the suit contending that the second Defendant is the adopted daughter and adoption was made as early as in the year 1975 as per Hindu Customs and usage. The first Defendant had spent her own amount for construction. She had also spent amount for medical treatment and Govindaraju. Ammini Ammal was never in possession and occupation of the property and deceased plaintiff has no manner of right or interest in the suit property - Item No. 1. In any event, she can claim only 1/3rd of undivided share.

6. Subsequent purchasers, respondents - Defendants 3 to 6 have filed their Written Statement contending that they have purchased the suit property from the first Defendant for valuable consideration under Sale Deed 30.01.1996. According to the Defendants 3 to 6, suit property Item No. 1 is the self-acquired property of the first Defendant and Ammini Ammal could claim no right. After purchasing the property, same has been settled in favour of the Defendants 5 and 6 by registered Settlement Deed dated 10.06.1999. According to the Defendants 3 to 6, they are the bonafide purchasers for valuable consideration and plaintiffs are not entitled to any share in the suit property and therefore, suit is to be dismissed as against the Defendants 3 to 6.

7. On the above pleadings, the trial Court framed one issue whether the plaintiffs were entitled to half of the suit property or not. The trial Court interalia recorded the following findings :-

The trial Court decreed the suit by the Judgment dated 17.06.2003 holding that the plaintiffs are entitled to half share in the suit property Item No. 1 in respect of Item No. 2 i.e. insurance amount and other terminal benefits payable to Govindaraju, the suit was dismissed;

Suit property item No. 1 was originally allotted to Govindaraju and he had constructed the residential house. The trial Court also found that the suit property item No. 1 is not the self-acquired property of the first Defendant;

Deceased Govindaraju and first Defendant had no issues and Ammini Ammal and

mother of first Defendant - wife of Govindaraju are Class I heir as per Hindu Succession Act and Ammini Ammal and the first Defendant are equally entitled to half share in the suit property;

The Will was executed by Ammini Ammal in favour of her sons - plaintiffs 1 to 3 and late P. Thangaraj and they being the legal heirs of Ammini Ammal.

8. Aggrieved by the Judgment and Preliminary Decree for partition, the Defendants have preferred the appeal in A.S. No. 28/2004. In the appeal, the first Appellate Court framed the following points for determination ; -

(a) Whether the petition property is the self-acquired property of 1st Defendant ?

(b) Whether the trial Court was right in deciding that the deceased Ammini Ammal is entitled to get share in the suit property?

(c) Without probating the Ex.A-3 - Will whether trial Court was right in finding that as per Will plaintiffs are entitled to half share ?

9. Insofar as the findings of the trial Court that the suit property is not the self-acquired property of Ammini Ammal, the first Appellate Court confirmed the findings of the trial Court. Relevant findings of the first Appellate Court is as under :-

10. The first Appellate Court also confirmed the findings that Ammini Ammal being mother of deceased Govindaraju and as Class I heir, she is entitled to half share in the suit property Item No. 1. Relevant findings of the first Appellate Court is as under :-

11. The first Appellate Court took the view that Ex.A-3 Will relates to the property within the limits of Chennai and therefore, the Will is to be probated. The first Appellate Court also took the view that without proving the Will, the rights of the parties cannot be determined. Finding that the right of the parties cannot be determined unless the Will is probated, the first Appellate Court set aside the judgment as trial Court and remitted the matter back to the trial Court to determine the genuineness of Ex.A-3 and the value to be attached to Ex.A-3 and unpro-bated registered Will.

12. Challenging the remand order, the learned Counsel for the Appellant has submitted that when the Appellate Court has confirmed the findings of the trial Court in respect of the rights of parties, the Appellate Court erred in remanding the matter on the ground whether the Will is to be probated. The learned Counsel for the Appellant further submitted that even in the absence of Will, plaintiffs being sons and legal heirs of Ammini Ammal, they would be entitled to a share, which aspect was ignored by the lower Appellate Court and the lower Appellate Court erred in remanding the matter to the trial Court to determine the correctness of the Will. Placing reliance upon 2007 (2) CTC 49 [Kaunathal and four others v. Aruhnighu Kanniammal Karuppasmy Thirukoil, Pothanur Chettipalayam, Coimbatore Rep. By its Executive Officer, and another], the

learned Counsel for the Appellants further submitted that the first Appellate Court cannot ordinarily remand the matter and when evidence is before the Court, the lower Appellate Court ought to have decided the matter in one way or other either in one way or other. The learned Counsel also submitted that the plaintiffs being aged, the remand order would cause serious prejudice to the plaintiffs.

13. Taking me through the plaint averments, the learned Counsel for the Defendants submitted that in the plaint, while the plaintiffs based their claim upon Will, now the plaintiffs cannot turn round and seek to base their claim on the basis of inheritance. The learned Counsel further argued that without probating Ex.A-3 Will, no right could be established in Court of law and therefore, lower Appellate Court rightly remanded the matter to the trial Court to enable the parties to adduce evidence in the light of Ex.A-3 unprobated Will. The learned Counsel for the Defendants also interalia made submissions touching the merits of the case. It is fairly well settled that the order of remand cannot be passed by the Appellate Court as a matter of course. Power of remand should be exercised sparingly. Endeavour of the Appellate Court should be to dispose of the case itself. There could be no bar in order that the party may have another option of adducing evidence to discharge his burden.

14. In Ashwinkumar K. Patel Vs. Upendra J. Patel and Others, the Apex Court has observed as follows:-

"7. In our view, the High Court should not ordinarily remand a case under Order 41, Rule 23, C.P.C., to the lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial court and considered whether the order of the trial court ought to be confirmed or reversed or modified".

15. In 2005 (12) S.C.C. 351 (K. Gopalan Nair Vs. K. Balakrishnan Nair and others). In that case the High Court had decided the appeal partly in favour of the respondents and remanded the matter for consideration of two issues to be re-decided by the trial court. Before the Supreme Court the grievance of the appellant was that the High Court should have decided the matter on the evidence on record without remitting the matter back to the Trial Court for admission of fresh evidence. While considering the same, the Apex Court has observed as follows:-

"Once the trial had been concluded, there was no question of defendants being given a second opportunity to prove their case before the Trial Court, the High Court should have decided the matter on the basis of materials available on record".

16. The Apex Court in the decision referred in the case of P. Purushottam Reddy

and Another Vs. Pratap Steels Ltd., while considering the scope of remand u/s 151, Order 41 Rules 23-A, 23, 25 and 27 of the CPC has laid down as follows:-

"10. It was a settled position of law before the 1976 Amendment that the Court, in an appropriate case could exercise its inherent jurisdiction u/s 151 CPC to order a remand if such a remand was considered pre-eminently necessary ex debito justitiae, though not covered by any specific provision of Order 41 CPC. In cases where additional evidence is required to be taken in the event of any one of the clauses of sub-rule (1) of Rule 27 being attracted, such additional evidence, oral or documentary, is allowed to be produced either before the appellate court itself or by directing any court subordinate to the appellate court to receive such evidence and send it to the appellate court. In 1976, rule 23-A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23-A as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rules 23 and 23-A. In view of the express provisions of these Rules, the High Court cannot have recourse to its inherent powers to make a remand because, as held in Mahendra Manilal Nanavati Vs. Sushila Mahendra Nanavati, it is well settled that inherent powers can be availed of ex debito justitiae only in the absence of express provisions in the Code. It is only in exceptional cases where the Court may now exercise the power of remand de hors Rules 23 and 23-A. To wit, the superior Court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 41 Rule 31 CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25 CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided".

17. Referring to the above decisions, in Kannathal and Others Vs. Arulmighu Kanniammal Karuppasamy Thirukoil and State of Tamil Nadu, and observing that if the issues arising in the suit could be decided on the evidence available on record, the lower Appellate Court itself should decide the case on merits without unnecessarily ordering remand, Justice K.Mohan Ram has held as under :-

"14. In the light of the law laid down by the Apex Court in AIR 1999 Supreme Court 1125 and P. Purushottam Reddy and Another Vs. Pratap Steels Ltd., the case on hand has to be considered. After the introduction of Rule 23-A the Appellate Court can order remand only if, (i) the trial court disposed off the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. Only when the said twin conditions are specified the Appellate Court can exercise the power of remand under Rule 23-A

as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rules 23 and 23-A. In view of the express provisions of these Rules, the Appellate Court cannot have recourse to its inherent powers to make a remand as it is well settled that inherent powers can be availed of *ex debito justitiae* only in the absence of express provisions in the Civil Procedure Code".

18. In the present case, the lower Appellate Court has not come to the conclusion that the findings of the trial Court in respect of Ex.A-3 Will is erroneous. The matter was remanded to the trial Court on the only ground that the Will was not probated and it is pertinent to note that Ammini Ammal filed the suit for partition. Ex.A-3 Will was executed subsequently. The learned Counsel for the Appellant has submitted that even dehors the Will, plaintiffs being legal heirs would be entitled to share the inheriting share of Ammini Ammal. As the entire evidence was available before the lower Appellate Court, the lower Appellate Court should have decided the case on merits by deciding as to what evidentiary value is to be attached to Ex.A-3 Will. In case the lower Appellate Court was not convinced of Ex.A-3 Will, the lower Appellate Court should have proceeded to decide the case on merits since all the legal heirs of Ammini Ammal are on record in the suit. As the plaintiffs and the first Defendant being the legal heirs of deceased Ammini Ammal, Ex.A-3 Will by itself is not pivotal. When the entire evidence on record and all the legal heirs of Ammini Ammal are also on record, in my considered view, the lower Appellate Court ought to have decided the matter one way or other and decided as to what would be the share of each one of the legal heirs.

19. Where all evidence has been duly placed before the trial Court and when trial Court has decided the matter on merits on the issues involved, the Appellate Court has no power to remand. Where no issue was left undecided, the order of remand cannot be passed and remand is not meant to provide fresh opportunity to party to litigation. If the lower Appellate Court does not agree with the reasonings of the trial Court, it-must give its own findings. But it is entirely wrong to send the case on remand, back to the trial Court.

20. The learned Counsel for the Defendants submitted that the plaintiffs having claimed share on the basis of Ex.A-3 Will, they cannot turn round and claim share as legal heirs. This contention does not merit acceptance much less it cannot be a ground for remand. Based on the subsequent evidence, viz., execution of Will or claim as legal heir of deceased, it would always be open to the plaintiff to raise such alternative pleas. It is for the lower Appellate Court to take the view whether to permit the plaintiffs to raise such alternative plea.

21. In the light of the law laid down by the Apex Court in the decisions reported in *Pandit Ishwardas Vs. State of Madhya Pradesh and Others*, and 2002 (2) S.C.C. 6S6 (referred to *supra*) this Court is of the considered view that the lower Appellate Court has committed an error of law in remanding the matter only for the purpose of affording an opportunity to the plaintiff to amend the pleadings and to adduce additional evidence. As laid down by the Apex Court it is not

proper for the Appellate Court to remand the case to enable the parties to make good their lapse. In my considered view, the lower Appellate Court has committed an error of law in remanding the matter for the purpose of determining the value to be attached to Ex.A-3 Will. For the foregoing reasons, this appeal is allowed and the Judgment and Decree of the lower Appellate Court in A.S. No. 28/2004 is set aside. However, there Will be no order as to costs. The lower Appellate Court shall dispose of the appeal A.S. No. 28/2004 after hearing both parties as expeditiously as possible, preferably within a period of three months from the date of receipt of a copy of this order.