

(1994) 08 MAD CK 0013
In the Madras High Court

Padmavathi Ammal and Others	Vs	APPELLANT
Alamelu Ammal and Others		RESPONDENT

Date of Decision : 11-08-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23

Citation : (1994) 2 MLJ 479

Hon'ble Judges : Govardhan, J

Bench : Division Bench

Judgement

Govardhan, J.—This appeal arises out of the judgment passed by the learned Subordinate Judge, Sivaganga, dated 24.11.1984 in A.S. No.

145 of 1982 remitting the suit O.S. No. 209 of 1981 to the trial court for fresh disposal as per the directions given in the judgment.

2. The case of the plaintiff is one for delivery of possession and permanent injunction against the respondents and the plaintiff relies upon a Will

executed by one Gomathi Ammal in his favour on 14.8.1978.

3. The defendants resisted the same contending that Gomathi Ammal had no right to execute any will and she had not validly executed any Will.

4. The trial court after considering the evidence placed before it, has held that the Will executed by Gomathi Ammal is true and valid and it was

executed while she was in a sound and disposing state of mind and therefore the plaintiff is entitled to right-over the suit properties and granted a

decree as prayed for.

5. Against the said judgment and decree, of the trial court, the defendants have preferred an appeal before the Subordinate Judge, Sivaganga. The

learned Subordinate Judge has observed in his judgment that there is no issue

framed as to whether the Will executed by Gomathi Ammal is true

and valid and therefore. The judgment of the trial court is liable to be set aside and allowed the appeal and remitted the matter to the trial court for

fresh disposal after framing an issue as to whether the Will executed by Gomathi Ammal is true and valid.

6. Against the judgment of appellate court, the plaintiffs have preferred this appeal.

7. The learned Counsel appearing for the appellants would argue that the learned Subordinate Judge before whom the appeal was filed by the

respondents-defendants, has remanded the matter for fresh disposal only on the ground that there was no specific issue with regard to the

genuineness of the Will executed by Gomathi Ammal and the learned Subordinate Judge has failed to consider that even though there is no specific

issue, the trial court has considered the validity of the Will in paragraphs. 9 to 11 of its judgment and therefore the order of remand is improper and

it has to be set aside. In paragraph 9 of its judgment, the trial court has considered the evidence of the Medical Officer who had given treatment to

Gomathi Ammal and who had attested the Will and the evidence of the compounder who had also attested the Will and has observed that there is

evidence to show that the testator had executed the Will while in a sound and disposing state of mind. In paragraph 10, the trial court has

considered the agreement said to have been executed between Gomathi Ammal and another and has given a finding that the said agreement does

not give sufficient reasons for cancelling the Will executed by Gomathi Ammal. It is thus seen that even though there is no specific issue framed by

the trial court with regard to the genuineness of the Will executed by Gomathi Ammal on 14.8.1978, it has considered the circumstances under

which the Will had been executed, the mental as well as the physical capacity of the testator who had executed the Will, the hallowness of the

defendants" version whether the Will had subsequently been cancelled and has come to the conclusion that the Will had been executed by Gomathi

Ammal while in a sound and disposing state of mind. While so, the learned Subordinate Judge has not considered all these facts and has allowed

the appeal and has remitted the matter to the trial court for fresh disposal only on the ground that there is no specific issue.

8. It has been held in the decision reported in Bhairab Chandra Nandan Vs. Ranadhir Chandra Dutta, , that in an eviction proceeding filed on the ground of bona fide need of a landlord, there was no issue framed in the trial court with regard to the availability of alternative suitable accommodation, but parties went to trial and adduced evidence with this issue in mind, and the attention of the court was also drawn to the existence of another house belonging to the landlord, and that house being not vacant, there was no need for the suit being remanded for a finding on that question. Their Lordships of the Supreme Court have held that though formally no issue was framed, the parties went to trial and adduced evidence with this issue in mind and have drawn the attention of the court to the existence of another house belonging to the appellant and the said house being not vacant and there is, therefore, no need for matter being remanded for a finding on the question whether alternative suitable accommodation is available for the appellant. When we apply the principle laid down in the above decision, we have to necessarily come to the conclusion that even though there is no specific issue framed during the trial in the court, the parties went to trial and adduced evidence with regard to a particular issue in mind and the attention of the court as also drawn to the subject-matter of the above issue and therefore, there is no necessity for the suit being remanded, for the specific purpose of framing an issue and giving a finding. No doubt, the powers of the remand under Rule 23 of Order 41 of the CPC are wide. But, when the trial court has decided all the disputes between the parties after considering the evidence placed before it, even though there was no specific issue framed for a particular point at dispute, the remand of the suit for framing a specific issue on that point is not called for at all. Order 41, Rule 23 of CPC being mandatory and not merely a formality unless the appellate court records that the judgment of the trial court is erroneous and is liable to be reversed or set aside remitting the matter for fresh disposal is not proper. In the present case, it cannot be stated that the lower appellate court has given a finding that the judgment of the trial court is erroneous and is liable to be reversed or set aside to justify the order of remand. In that view, I am of opinion that the judgment of the learned Subordinate Judge, Sivaganga allowing the appeal and remitting the matter to the trial court for fresh disposal is liable to be set aside.

9. In the result, the appeal is allowed and the judgment and decree of the lower appellate court are set aside and the lower appellate court is

directed to consider the entire evidence afresh and render a finding by itself on the subject-matter of the appeal. No costs.