

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.08.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.No.376 of 2007

&

M.P.No.1 of 2007

S.Gulab Maideen

.. Appellant/Respondent/Plaintiff

-Vs-

Mrs.Anthony Selvam

.. Respondent/Appellant/Defendant.

Second Appeal filed under section 100 of C.P.C against the judgment and decree dated 28.04.2006 made in A.S.No.17 of 2006 on the file of the Sub-Court, Nagapattinam reversing the well considered judgment and decree of the trial Court dated 05.12.2005 made in O.S.No.195 of 2002 on the file of District Munsif Court, Nagapattinam.

For appellant : Mr.G.Vivekanand

For Respondent : Mr.V.Raghupathi

JUDGMENT

The plaintiff, who succeeded in the trial Court but lost the case in the appeal before the lower appellate Court, is the appellant in the second appeal. He filed the original suit for bare injunction.

2. In the trial, four witnesses were examined as Pws 1 to 4 and 20 documents were marked as Exs.A1 to A20 on the side of the appellant herein/plaintiff. On the side of the respondent herein/defendant, he alone figured as the sole witness (DW1) and two documents were marked as Exs.B1 and B2. The report of the Commissioner and the plan submitted by the Commissioner appointed by the trial Court were marked as Court documents Exs.C1 and C2.

3. The learned trial Judge, after considering the evidence, chose to grant the decree as prayed for by a judgment and decree dated 05.12.2005. Aggrieved by the same, the respondent herein/defendant preferred an appeal before the lower appellate Court (Sub-Court, Nagapattinam) in A.S.No.17 of 2006. The learned lower appellate Judge seems to have allowed the marking of five more

documents on the side of the respondent herein/defendant in the appellate Court and marked them as Exs.B3 to B7. Relying on those documents and reading them into evidence, the learned lower appellate Judge chose to allow the appeal and set aside the decree passed by the trial Court and dismissed the suit holding that the appellant herein/plaintiff was not entitled to the relief sought for. The said decree of the lower appellate Court dated 28.04.2006 is the subject matter of challenge in the second appeal. The appeal came to be admitted on 23.03.2007 identifying the following to be the substantial question of law involved in the second appeal:

"Whether the finding of the lower appellate Court that the possession of the present suit property is with defendant as per Ex.A5 is sustainable in view of the admission of the defendant himself that the suit property is not in possession of the defendant."

4. As per Section 100 of the Civil Procedure Code, when the High Court admits the second appeal, must precisely formulate the substantial question of law involved in the second appeal on which the second appeal is admitted for hearing. It does not mean that such a question formulated cannot be contended by the respondent at the time of hearing to be not a substantial question of law involved in the second appeal. Similarly, the appellant, whose second appeal is admitted identifying the substantial questions of law cannot raise any additional question of law without the leave of the Court. However, at the time of arguments, the Court can grant permission to raise any additional substantial question of law. Such a power to grant leave has been preserved in order to render complete justice in a case that comes up before the High Court. Simply because a wrong question came to be formulated and a material substantial question of law was omitted to be formulated at the time of admission of the second appeal, the appellant should not be deprived of his right to contest the appeal on a valid substantial question of law.

5. In the case on hand, though the above question alone was formulated as the substantial question of law, at the time of hearing of the second appeal, the learned counsel for the appellant seeks the leave the Court to raise an additional substantial question of law regarding the propriety of the lower appellate Court marking the documents produced by the respondent/defendant in the appeal without following the procedure contemplated under Order XLI Rule 27 and 28 of the Code of Civil Procedure. Hence, leave is granted and the additional substantial question of law is formulated as follows:

" Whether the lower appellate Court committed an error in law in simply marking the documents produced by the respondent herein before the lower appellate Court as Exs.B3 to B7 and referring to the same in the judgment without following the procedure contemplated under Order XLI Rule 27 and 28 CPC for the reception of additional evidence in the appellate stage?"

6. The learned counsel for the appellant in the second appeal would contend that though an application under Order XLI Rule 27 was filed quoting a wrong provision, namely Order XXI Rule 47 for the reception of additional evidence in the appellate stage, the lower appellate Court, without considering the application seeking permission to adduce additional evidence, simply heard the appeal on merits, marked the documents suo motu, allowed the appeal and consequently dismissed the said application and that the said procedure adopted by the lower appellate Court will prove to be a mockery of justice.

7. The learned counsel for the respondent also is not in a position to dispute the correctness of the above said contention. Whenever a petition for reception of additional evidence is filed in the appellate stage under Order XLI Rule 27 CPC, the appellate Court shall follow the procedure of hearing the application along with the appeal so as to find out whether the case could be brought within the ambit of Rule 27. In a number of cases, it has been pointed out that the requirement is to hear the application along with the appeal and it shall not be mandatory to incorporate the order passed in the application in the judgment. When the application is dismissed, the same can be incorporated in the judgment and the appellate Judge can proceed with the pronouncement of the judgment in the appeal on merits. When the appellate Court decides to allow the application, then except under one contingency, namely wherein the opposite party consents for the marking of documents sought to be produced as additional evidence and does not insist upon formal proof of such documents, those documents can be marked during the course of argument itself and the appellate Court can proceed with the pronouncement of judgment. The said procedure has been wrongly applied by the learned lower appellate Judge by allowing the respondent herein to mark the documents without proof of the same either by consent or by evidence proving the said documents and at the same time, passing an order dismissing the application filed seeking permission to adduce additional evidence. The procedure adopted by the learned lower appellate Judge is self-contradictory. It shows lack of knowledge of law in this regard. The said aspect alone shall be sufficient to interfere with the decree of the lower appellate Court. Accordingly, the additional substantial question of law formulated today is answered against the respondent and in favour of the appellant. In view of the answer given to the additional substantial question of law, this Court is of the view that substantial question of law formulated at the time of admission need not be answered and the answer given to the additional substantial question of law shall be enough to set aside the decree of the trial Court and remit the matter back to the lower appellate Court to follow the procedure contemplated under Order XLI Rule 27 and 28 CPC. The marking of five documents in the appellate stage shall stand cancelled. This Court has to take such a stand to remit the matter back to the lower appellate Court, since the learned counsel for the respondent would submit that without the help of the additional

document produced before the lower appellate Court, he may be handicapped in establishing the case of the respondent.

8. For the reasons stated above, the second appeal is allowed and the decree of the lower appellate Court dated 28.04.2006 is set aside. The marking of Exs.B3 to B7 by the lower appellate Court shall stand cancelled. The appeal A.S.No.17 of 2006 is remitted back to the lower appellate Court for fresh disposal after reviving the petition filed for adducing additional evidence and permitting the respondent to correct the provision of law quoted in the said petition. The learned lower appellate Judge shall dispose of the Appeal suit within three months from the date of receipt of records from this Court. It is made clear that the appellant herein / plaintiff, who is the respondent in the appeal suit before the lower appellate Court, shall have every right to file a counter and oppose the application for adducing additional evidence. There shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

gpa

s/d-
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

To

1. The Subordinate Judge
Nagapattinam
2. The District Munsif Court
Nagapattinam
3. The Section Officer,
VR.Section, High Court, Madras

+ 1 cc to Mr.G.Vivekanand, Advocate SR 41569

+ 1 cc to Mr.V.Raghupathi, Advocate SR 41369

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