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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:17.3.2009

Coram:

THE HONOURABLE MR.JUSTICE G.RAJASURIA

S.A.No.30 of 2009

and

M.P.No.1 of 2009

G.Yesadian

...Appellant/Plaintiff

vs.

1.Durai,
2.Manickam
3.Revathi
4.Boggiammal
5.Ganavoli
6.Nagabushanam
7.Babu
8.Nagoor
9.Govindammal
10.The Collector of Tiruvallur District,
at Tiruvallur Town
11. The Tahsildar,
Pallipattu (Natham)
Pallipattu Town,
Pallipattu Taluk.

12. The Special Tahsildar,
Adi Dravidar Welfare,
Tiruthani Town,
Tiruthani Taluk.

... Respondents/Respondents

This second appeal is filed against the judgement and decree dated 25.9.2007 passed in A.S.No.38 of 2006 by the Sub Court, Tiruvallur, confirming the judgement and decree dated 30.12.2005 passed by the District Munsif, Pallipattu, in O.S.No.694 of 2001.

MP.No.1/2009 : This petition filed under order 39 Rules 1 & 2 of the CPC to grant an ad interim injunction, pending disposal of the Second Appeal, restraining the respondents herein, more particularly respondents 4,5 and 10 to 12 from putting up any construction on the B-Schedule property described hereunder which is the subject matter in O.S.No.694/2001 District Munsif Court, Pallipattu.



For Appellant : No appearance
For Respondents : No appearance

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JUDGMENT

This second appeal is focussed by the original plaintiff, animadverting upon the judgement and decree dated 25.9.2007 passed in A.S.No.38 of 2006 by the Sub Court, Tiruvallur, confirming the judgement and decree dated 30.12.2005 passed by the District Munsif, Pallipattu, in O.S.No.694 of 2001, which was for declaring the plaintiff's title over the 'B' scheduled property and to direct the defendants 1 to 9 to deliver vacant possession of the 'B' scheduled property and for mandatory injunction directing the respondents 10 to 13 to cancel house site patta issued in the name of the defendants. For convenience sake, the parties are referred to hereunder according to their litigative status before the trial Court.

2. The second appellant herein filed the suit O.S.No.694 of 2001 before the District Munsif, Pallipattu, seeking the following reliefs:

- "a) to declare the plaintiff's right, title and interest in the 'B' schedule property;
- b) to direct the defendants 1 to 9 to deliver vacant possession of the suit 'B' schedule property after removing the thatched house, cattle shed and white stones to the plaintiff, failing which through process of this Hon'ble Court;
- c) to direct the defendants 10 to 13 to cancel house site patta issued in the name of the defendants by way of mandatory injunction."

Whereupon the defendants 1, 2 and 8 entered appearance and filed the written statement.

(b) During trial, the plaintiff examined himself as Ex.P.W.1 and Exs.A1 to A22 were marked. D1 examined himself as D.W.1 on his side and Exs.B1 to B22 were marked. Ex.C1 and Ex.C2 were marked as Court documents.

(c) Ultimately, the trial Court dismissed the suit. As against which, the appeal was filed for nothing but to be dismissed by confirming the judgement and decree of the lower Court.

3. Unhinged and disconcerted by the order of both the Courts below, this second appeal is focussed on various grounds and also by suggesting the following substantial questions of laws:



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"1) When the appellant/plaintiff had filed a memo in the lower appellate Court stating that during the pendency of S.A.No.1354/1992 in the High Court, the Tahsildar, Pallipattu had converted the land in Gramanatham S.No.79/4 into S.No.82/4 and issued patta in favour of Bojjiammal and another under Exts.B2 and B3 without following the rules and procedures, it was the duty of the Government to produce all the records to show that everything was done properly and the lower appellate Court went wrong in confirming the judgment and decree of the trial Court.

2) The Government should have produced the sale deed executed by the appellant or his mother, if it is its case that they purchased it, and its failure to do so would clearly prove the case of the appellant.

3) If it is the case of the Government that it acquired the land, a notice should have been served on the appellant, or at least they should have passed an award and paid compensation to the, but no records had been produced by the Government.

4) The fact that respondents 10 to 12 remained absent and were set ex parte before the trial Court, goes a long way to establish that there was something fishy in their transactions, which they have not disproved so far.

5) Though the suit O.S.No.321/79 was filed by one Yesupatham against the appellant herein, the appellant herein was declared entitled to the property by the trial Court therein, and the same has been confirmed both by the lower appellate Court and the High Court in S.A.No.1354 of 1992, and hence the failure of the appellant to file a separate suit for declaration and title, as held by the courts below in the present suit, cannot be said to go against his title."

4. A bare poring over and perusal of the typed set of papers, including the judgements of both the Courts below, would exemplify and expatiate, demonstrate and display that the contention and the case of the plaintiff precisely is that the 'B' scheduled property in the plaint measuring an extent of 8 feet East to West and 66 feet North to South is situated in Survey No.82/10, New Gramanatham No.79/4, which forms part of 'A' scheduled property and that it belongs to him. However, the trial Court, in its judgement dealt with the claim of the plaintiff at length and rejected it.

5. The plaintiff admittedly is having no title deed of his own. However, he relied upon Ex.A2 and Ex.A3-the judgement and decree in O.S.No.321 of 1979 and Exs.A4 and A5-the judgement and decree in A.S.No.1354 of 1992. The lower Court correctly referred to the suit property in the previous suit O.S.No.321/79 and observed in paragraph



8 that the 'A' scheduled property in this suit and the 'A' scheduled property in the previous suit 321/79 were not one and the same and in support of that, the lower Court also pointed that the Northern boundary was shown as the house of one Gengan, whereas in the present suit 'A' scheduled property was shown as the defendants' house. Similarly, the eastern boundary also does not tally. Over and above that, Ex.C1-the report of the Surveyor, as correctly referred to by the lower Court, would demonstrate and evince that the 'B' scheduled property referred to in the plaint is situated only in Survey No.82/4 and not in Survey No.82/10. Absolutely there is no shard or shred, scintilla or miniscule extent of evidence on the side of the plaintiff that the 'B' scheduled property is situated in Survey No.82/10 as claimed in the plaint.

6. It is a common or garden principle of law that the burden of proof is on the plaintiff to establish the case and he cannot simply fob off his burden on the defendant. The lower Court also referred to the fact that the 'B' Scheduled property described in the plaint actually comes under Survey No.82/4, which was allotted by the Collector in favour of the defendants under the scheme for providing houses for Harijan and that said area was converted as Gramanathan, as per the proceedings of the Collector, dated 31.12.1997.

7. The lower Court also pointed out as to how the plaintiff is blowing hot and cold, approbating and reprobating in view of the fact that as the plaintiff himself contended that his mother purchased the land through sale letters and it is not known as to how, as per the Transfer of Property Act and sale letter could confer title on the plaintiff.

8. The trial Court also adverted to the fact that there is nothing to indicate and exemplify precisely on what date the defendants encroached into the 'B' Scheduled property. The Commissioner's report and the sketch, namely, Exs.C1 and C2, would buttress and fortify the stand of the defendants that they are in possession of the 'B' Scheduled property on the strength of assignment pattas Ex.B2 and Ex.B3. The plaintiff's challenge to the very issuance of pattas is neither here nor there. As correctly held by both the Courts below there is no legal document to establish and evince that the plaintiff is entitled to the 'B' scheduled property. As has been correctly pointed out by both the Courts below, the judgements and decrees, as found in Exs.A2 to A5 are not referring to the Survey No.82/4. Those judgements are only judgements in personam and not in rem and as such, those judgements are not having any binding effect on the present defendants.



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9. In paragraph 13 of the lower Court judgement, the lower Court also referred to the judgements cited on the side of the plaintiff and pointed out as to how those judgements are not relevant to these proceedings.

10. In the proposed substantial question of law (1) the plaintiff placed reliance on the memo filed before the appellate Court as though during the pendency of the suit, the Government officials converted the Gramanatham land as patta land, without following the procedure.

11. Here the first and foremost point to be borne in mind is that the scope of the suit should be looked into. Once it is found that the plaintiff is not having title over the 'B' scheduled property, it is not known as to how he could weave rope of sand by trying to pick holes in the case of the defendants. The plaintiff has to stand or fall on the strength of his own case and not by trying to pick holes in the case of the defendants.

12. The suggested proposed question of law (2) is ex facie and prima facie far from being considered as question of law much less substantial of law.

13. Suggested question of law (3) is relating to Respondents 10 to 12, who remained ex-parte before the trial Court and that it cannot be termed as a question of law.

14. In the suggested question of law (4) reliance was placed on the earlier judgements as found in Exs.A2 to A5, which in view of my discussion supra cannot be pressed into service as against the defendants herein.

15. At this juncture, my mind is redolent and reminiscent of the following decisions of the Honourable Supreme Court:

(i) (2006) 5 Supreme Court Cases 545 - HERO VINOTH (MINOR) VS. SESHAMMAL, certain excerpts from its would run thus:-

"17. After the amendment a second appeal can be filed only if a substantial question of law is involved in the case. The memorandum of appeal must precisely state the substantial question of law involved and the High Court is obliged to satisfy itself regarding the existence of such a question. If satisfied, the High Court has to formulate the substantial question of law involved in the case. . . .
. . . ."

18. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory



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right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add or to enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts will not be disturbed by the High Court in exercise of the powers under this section. Further, a substantial question of law has to be distinguished from a substantial question of fact.

21. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by sufficing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In *Guran Ditta v. Ram Ditta* the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 100 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In *Sir Chunilal* case the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in *Rimmalapudi Subba Rao v. Noony Veeraju* (*Sir Chunilal* case, SCR p.557)

"When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law."

This Court laid down the following test as proper test, for determining whether a question of law raised in the case is substantial: (*Sir Chunilal* case, SCR pp.557-58)

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or



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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 or by the Privy Council or by the Federal Court or is not free from difficulty or call for discussion of alternative views. 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 that the plea raised is palpably absurd the question would not be a substantial question of law."

23. 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. It will, therefore, depend on the facts and circumstance of each case whether a question of law has 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. (See Santosh Hazari v. Purushottam Tiwari).

24. . . .

(iii) The general rule is that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the Courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."



(ii) 2008(4) SCALE 300 - KASHMIR SINGH VS. HARNAM SINGH AND ANOTHER, an excerpt from it would run thus-

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9. It has been noted time and again that without insisting for the statement of such a substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under Section 100 of the Code. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of the powers under this Section in several cases, the findings of fact of the first appellate Court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add or to enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts will not be disturbed by the High Court in exercise of the powers under this Section. Further, a substantial question of law has to be distinguished from a substantial question of fact. This Court in *Sir Chunilal v. Mehta and Sons Ltd. v. Century Spg. & Mfg. Co. Ltd.* (AIR 1962 SC 1314) held that:

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, 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 or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. 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 that the plea raised is palpably absurd the question would not be a substantial question of law."

A plain reading of the above judgements would leave no doubt that unless there is substantial question of law involved in a matter, no second appeal would lie.



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16. My discussion supra would connote and denote that here absolutely there is no merit in the second appeal and accordingly, the same is dismissed. No costs. Consequently, connected miscellaneous petition is dismissed.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

Msk

To

1. The Subordinate Judge, Tiruvallur.
2. The District Munsif, Pallipattu.

1 cc To Mr.P.S.Balasubramaniam, Advocate, SR.8339.

S.A.No.30 of 2009

SGL(CO)
RVL 31.03.2009