

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.02.2015

CORAM

THE HON'BLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.7 of 2015
and
M.P.No.1 of 2015 and M.P.No.2 of 2015

P.Kumar ... Appellant/1st Respondent/
1st defendant

-Versus-

1.Thillainayagi ... 1st Respondent/Appellant/
Plaintiff

2.Ramnath Dave
Hereditary Trustee,
Tawker Charity,
Sri Kasiviswanathan Temple,
Ayanavaram, Chennai 600 023. ...2nd Respondent/2nd
Respondent/2nd respondent

This second appeal is filed against the judgment and decree dated 25.03.2014 made in A.S.No.164 of 2013 by the learned XVII Additional Judge, City Civil Court, Chennai, reversing the judgment and decree dated 01.08.2011 made in O.S.No.6032 of 2008 by the learned XVII Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.A.Anthony Robson for
Mr.C.P.Sivamohan

For Respondents : Mr.K.Prabhakaran for R1

JUDGMENT

The 1st defendant in O.S.No.6032 of 2008 on the file of the learned XVII Assistant Judge, City Civil Court, Chennai, is the appellant herein. The 1st respondent herein is the sole plaintiff in the suit and the 2nd respondent herein is the 2nd defendant in the suit. The said suit was filed for declaration (i) that the settlement deed dated 25.07.1996 said to have been executed by one late Ayyakannu in favour of the 1st defendant, registered as Doc. No.5148 of 1996 at the Office of the Sub Registrar, Sembiam, in respect of the suit property bearing Door No.18, Bangaru Reddy Street, Ayanavaram, Chennai-23 is null, void, sham and nominal and

not binding on the plaintiff; and (ii) that the plaintiff is the absolute owner of the suit property; and (iii) for permanent injunction restraining the 1st defendant from interfering with his peaceful possession; and also (iv) for permanent injunction restraining the 2nd defendant from transferring the tenancy rights of the suit property to the 1st defendant. The trial court, by judgement and decree dated 01.08.2011, dismissed the suit. As against the same, the 1st respondent herein filed an appeal in A.S.No.164 of 2013 before the learned XVII Additional Judge, City Civil Court, Chennai. The learned XVII Additional Judge, by judgement and decree dated 25.03.2014 allowed the appeal, set aside the judgement and decree of the trial court and allowed the suit as prayed for. Aggrieved over the judgement and decree of the first appellate court, the 1st defendant is now before this court with this second appeal.

2. This second appeal has come up for admission. I have heard the learned Counsel on either side and also perused the records carefully.

3. Pending second appeal, the appellant/1st defendant has filed a miscellaneous petition in M.P.No.2 of 2015 seeking permission to adduce additional evidence by issuing subpoena to Sri.K.Subramani, residing at No.62, Balakumaran Nagar, B-Part, Kolathur, Chennai 600 099 directing him to depose in connection with the execution of deed of settlement dated 25.07.1996 by late Sri.Ayyakannu.

4. From the submissions made on either side, the following substantial question of law has arisen for consideration:-

"Whether, at this stage, the appellant/1st defendant can be permitted to examine one of the attestors to the settlement deed in question by way of additional evidence?"

5. Admittedly, late Ayyakannu was originally the owner of the property. But, according to the 1st defendant, late Sri.Ayyakannu executed the settlement deed dated 25.07.1996 in his favour. But, according to the plaintiff, the settlement deed was not at all executed by late Sri.Ayyakannu. The first appellate court has held that the settlement deed has not been proved in accordance with law as required under Section 68 of The Evidence Act inasmuch as one of the attestors was not examined. It is because of this reason, the miscellaneous petition in M.P.No.2 of 2015 has been filed to examine one of the attestors.

6. A detailed counter has been filed by the 1st respondent/plaintiff wherein it is stated that on the earlier occasion, as a matter of fact, an attempt was made by the 1st defendant to examine Sri.K.Subramani, but, later on, it was informed to the first appellate court that Sri.K.Subramani was not inclined to

depose and therefore, he was not examined. When that be so, according to the 1st respondent/plaintiff, at this length of time, that too, after the first appellate court has decreed the suit as prayed for, this miscellaneous petition cannot be allowed.

7. The learned counsel appearing for the 1st respondent has relied on a judgement of this court in P.V.Subba Raja v. S.S.Narayana Raja and others, AIR 1954 Madras 1074 to substantiate his contention that, at this length of time, the appellant/1st defendant should not be allowed to examine one of the attestors to the settlement deed in question as additional witness.

8. But, the learned counsel appearing for the appellant has relied on a judgement of this court in T.P.Mani v. Palanisamy and another, 2009 (5) CTC 117 : 2009 (8) MLJ 577, wherein a contrary view has been taken.

9. In my considered opinion, there can be no straight-jacket formula that an additional evidence should not be allowed at the second appeal stage. It all depends upon the facts and circumstances of each and every case. In the instant case, as contended by the learned counsel for the appellant, the appellant cannot be expected to know that proof of settlement deed requires examination of at least one of the attestors. The appellant should have been advised by his counsel to examine one of the attestors by apprising him of the legal position. For the lack of diligence on the part of the Adviser, the appellant cannot be deprived of his valuable right to have an effective contest in the case. The entire claim in this case is made on the settlement deed. Therefore, it is absolutely necessary to permit the appellant to examine the attesor - Sri.K.Subramani as additional witness. For that purpose, I am inclined to set aside the decree and judgement of the first appellate court by allowing this appeal and to remand back the matter to the first appellate court with a direction to the first appellate court to permit the 1st defendant to examine Sri.K.Subramani, one of the attestors to the settlement deed dated 25.07.1996 and also to permit the plaintiff to let in additional evidence, if any, and then to dispose of the appeal suit in accordance with law.

10. In the result, M.P.No.2 of 2015 is allowed. The second appeal in S.A.No.7 of 2015 is also allowed. The judgement and decree dated 25.03.2014 made in A.S.No.164 of 2013 are hereby set aside and the appeal in A.S.No.164 of 2013 is remanded back to the first appellate court for fresh disposal in accordance with law with a further direction to permit the 1st defendant to examine Sri.K.Subramani, one of the attestors to the settlement deed dated 25.07.1996 or any other witness and also permit the plaintiff to let in additional evidence, if any. The first appellate court shall, at

any rate, dispose of the appeal in A.S.No.164 of 2013 within a period of two months from the date of receipt of a copy of this order. Both parties shall bear their respective costs. Consequently, M.P.No.1 of 2015 is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

kmk

- 1.The XVII Additional Judge, City Civil Court, Chennai
- 2.The XVII Assistant Judge, City Civil Court, Chennai.

+ 1 cc to M/s. C.P. Sivamohan, Advocate Sr.10755

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