



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 07.08.2015

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

CMA.(MD)No.455 of 2015

and

M.P(MD)No.1 of 2015

A.Ramaiah :Appellant/Respondent/Plaintiff

Vs.

V.Subbulakshmi : Respondent/Appellant/Defendent

Appeal filed under Order 43 Rule 1 of Civil Procedure Code, to set aside the Judgment and Decree of the Appellate Court, dated 28.10.2014 made in A.S.No.47 of 2013 on the file of the Principal District Court, Tirunelveli, setting aside the judgment and Decree of the Trial Court, dated 04.02.2011 made in O.S.No.201 of 2008 on the file of the Principal Sub Court, Tirunelveli and remitting the matter to the Trial Court and to allow the present Civil Miscellaneous Appeal.

For Appellant : Mr.S.P.Maharajan
For Respondent : M/s.V.Jeyarani

Judgement reserved on 31.7.2015
Judgement delivered on 07.08.2015

JUDGMENT

The appeal is filed by the appellant to set aside the Judgment and Decree of the Appellate Court, dated 28.10.2014 made in A.S.No.47 of 2013 on the file of the Principal District Court, Tirunelveli, setting aside the judgment and Decree of the Trial Court, dated 04.02.2011 made in O.S.No.201 of 2008, on the file of the Principal Sub Court, Tirunelveli and remitting the matter to the Trial Court.

2.The appellant is the plaintiff in O.S.No.201 of 2008 on the file of the Sub Court, Tirunelveli and respondent in A.S.No.47 of 2013, on the file of the Principal District Court, Tirunelveli.

3.The appellant filed suit for Specific Performance of the agreement of sale, dated 15.11.2007, in respect of suit property. According to the appellant, the respondent agreed to sell the suit property for a sum of Rs.4,54,750/- and received a sum of Rs.3,00,000/- as advance. The period of agreement of sale was 9 months. The period of agreement of sale was reduced into writing by agreement, dated 15.11.2007. The appellant's father and respondent's husband are brothers. Some dispute arose between the



appellant's mother and respondent. Therefore, the respondent refused to execute the sale deed even though appellant was ready and willing to perform his part of the contract and get the sale deed executed in his favour. Therefore, he filed suit for specific performance.

4.The respondent denied the execution of agreement of sale. She has stated that signature in the agreement is not her signature and it is a forged one. To prove the signatures, appellant examined P.W.2, who attested the agreement. The respondent examined D.W.2 and D.W.3, who are the Deputy Manager of State Bank of India, Perumalpuram and Manager of Indian Bank, Palayamkottai. Through them she marked Ex.B2, a loan application in State Bank of India and Ex.B3 specimen signature of respondent obtained at the time of opening an account in Indian Bank.

5.The Principal Sub Judge rejected the evidence of D.W.2 and D.W.3 and Ex.B2 and Ex.B3 and held that signatures in agreement of sale Ex.A1 is that of respondent and decreed the suit. Against that, the respondent filed A.S.No.47 of 2013. She also filed I.A.No.114 of 2014 for sending the Ex.A1, Ex.B2, Ex.B3 to be compared by handwriting expert. The learned Principal District Judge, Tirunelveli considering the materials on record and arguments of learned counsel for the parties came to the conclusion that signature in disputed document Ex.A1 agreement of sale and admitted document Ex.B2 and Ex.B3 should be compared by handwriting expert to decide the issue. The learned Principal District Judge also held that P.W.2 attesting witness is the brother of the appellant and the proof affidavit filed by P.W.2 was not attested and therefore, the learned Trial Judge erred in taking the same on file and relied on the evidence of P.W.2. For these reasons, the learned Principal District Judge allowed the appeal as well as I.A.No.114 of 2014 and remitted the matter to the Trial Court to send Ex.B2 and Ex.B3 and other documents to get the opinion of handwriting expert. The learned Principal District Judge also permitted both the appellant and respondent to let in further evidence and directed the Trial Court to decide the suit on merits.

6.Against the said judgment and decree, dated 28.10.2014, the appellant has filed the present appeal.

7.The learned counsel appearing for the appellant contended that the first appellate Court erred in remitting the matter on the ground that:-

I) P.W.2 was examined in Chief and recorded the statement of P.W.2 that signature found in proof affidavit is his signature. The admission of signature by P.W.2 is valid more than that of attestation by an Advocate. Omission to attest proof affidavit is only procedural lapse and it was cured when P.W.2 admitted his signature in cross.

ii) The learned counsel for the respondent/defendant did not question the proof affidavit of P.W.2.

iii) The evidence of P.W.2 proved the signature of



respondent in Ex.A1.

iv) The Trial Court has elaborately dealt with the signature of respondent and came to the conclusion that the signature found in Ex.A1 is that of signature of respondent.

v) It is not open to the lower appellate Court to set aside the said judgment of hyper technicalities.

vi) The Trial Court considered the evidence of D.W.2 and D.W.3 and Ex.B2 and Ex.B.3 and rejected both oral and documentary evidence after giving valid and cogent reasons.

Vii) The lower appellate Court erred in allowing I.A.No.114 of 2014 in A.S.No.47 of 2013 filed by the respondent as Ex.A1 is dated 15.11.2007 while Ex.B2 and Ex.B3 of the year 1995 and 2006.

viii) The lower appellate Court erred in directing the trial Court to give evidence by both parties and to prove the case once again.

ix) The learned counsel for the appellant referred the Section 7 of Oaths Act 1969 and Order 8 Rule 4 CPC with regard to recording of evidence and contended that lower appellate Court is not correct in holding that the Trial Court ought not to have taken evidence of P.W.2 on file.

x) The learned counsel for the appellant referred to Section 99 of Evidence Act and stated that no decree can be reversed for error or irregularity not affecting the merits or jurisdiction.

xi) The lower appellate Court did not properly exercise the power under Order 41 Rules 23 and 23-A of CPC.

8. The learned counsel for the appellant relied on the following Judgments.

i) (2006) 1 Supreme Court Cases 75 (Uday Shankar Triyar v. Ram Kalewar Prasad Singh)

ii) 2009-4 L.W.494 (N.P.Murugan v. M/s.Himachale Pradesh Horticultural Produce Marketing and Processing Corporation)

iii) AIR 1977 PUNJAB & HARYANA 257 (Smt.Mukhtiar Kaur, v. Smt.Ghulab Kaur)

iv) AIR (39) 1952 Supreme Court 54 Rameshwar Kalyan Singh v. State of Rajasthan)

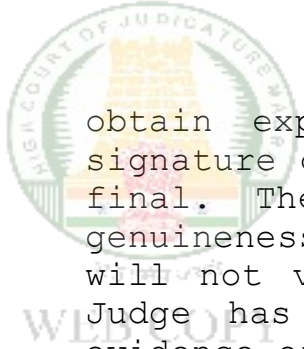
V) 2015(3) TLNJ 126 (civil) (Enose vs. Palaiyan)

vi) 2008(8) MLJ 299 (R.Elango v. K.Dhanasekaran and others)

vii) 2008(1) CTC 816 (Ammani Ammal vs. Dhanalakshmi Bank Ltd., Tiruppur)

9. The learned counsel for the appellant relying on the above

<https://hcmemberss.in/hcserverost> contended that Courts can compare the admitted signature and disputed signature and come to the conclusion that whether disputed signature is genuine or not. This Court can



obtain expert opinion by referring the disputed and admitted signature of contemporary period. But the opinion of expert is not final. The Court has to form its opinion with regard to genuineness of disputed signature and that lapse in the procedure will not vitiate the evidence given by P.W.2. The learned Trial Judge has properly appreciated the procedure and accepted the evidence of P.W.2.

10. Per contra, the learned counsel for the respondent contended that:-

I) Appellant's father and respondent's husband are brothers and were doing Real Estate business.

ii) The respondent's husband was doing engineering business and he was earning considerable income.

iii) From the earnings in Engineering business, the respondent's husband purchased the property in her name. The documents of title of the suit properties were kept in the office premises where real estate business was run by the appellant's father and respondent's husband.

iv) The respondent did not agree to sell the suit property to the appellant and did not execute the Ex.A1 and did not receive any amounts as advance.

v) The appellant and others have forged the signature of respondent.

vi) The appellant taken all the documents of title of suit property from the office where real estate business was run and forged the signature of the respondent in Ex.A1.

vii) The proof affidavit of P.W.2 was not attested and the proof affidavit was not produced with clean hands and it cannot be admitted in evidence. P.W.2 is the brother of appellant and to grab the suit property or money from the respondent, they have come out with the present case.

Viii) The respondent had summoned P.W.2 Manager of State Bank of India. P.W.3 Deputy Manager of Indian Bank and marked Ex.B2 dated 27.09.2006 and Ex.B3 dated 28.06.1995 which are bank records having signature of respondent. The Trial Court without any proper reason rejected those documents.

ix) The Courts have power under Section 45 of Evidence Act to compare the disputed and admitted signature and come to the conclusion that the disputed signature should be sent to Tamil Nadu Forensic Department for comparison with admitted signature Ex.B2 and Ex.B3.

11. The learned counsel for the respondent relied on the following judgements:

i) 2013(4) MLJ 164 (G.Govindaraj vs. R.Kothandarama Gokuldoss (died) and others)

https://hcservices.courts.gov.in/hcservices/courts/2015/1/1/CTC_256 (M.Kaliamoorthy vs. Dhanuskodi)

and contended that it is for the person, who affirms a particular fact must prove it. The Court after getting opinion from the



handwriting expert must come to a conclusion with genuineness of the signature.

12. Heard the learned counsel appearing for the appellant and the respondent and perused the materials on record and the judgment relied on by the counsel for the appellant and the respondent.

13. The present appeal is against the order of remand passed by the Principal District Judge, Tirunelveli directing the Trial Court to send Ex.A1, Ex.B2 and Ex.B3 and any other documents for comparison and to get opinion from the handwriting expert and giving opportunity to the parties to adduce further evidence and decide the same on merits.

14. The lower appellate Court has power to remand the case as per Order 41 Rules 23 and 23-A C.P.C. At this juncture, it is relevant to extract Order 41 Rules 23 and 23-A C.P.C.

"23. Remand of case by Appellate Court.- Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

23A. Remand in other cases.- Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23."

15. As per the abovesaid Rules, while reversing the decree of trial Court, the lower appellate Court may if it thinks fit a re-trial is necessary, it can remand the case to the trial Court, for fresh trial. The first appellate Court may direct what issue or issues shall be tried. It is well settled that the lower appellate Court cannot remand a matter mechanically or in an arbitrary manner. The order of remand should be based upon sound and reasonable grounds. The lower appellate Court without sufficient cause, should not order remand of the suit. The lower appellate Court can exercise the power of remand, only on the finding that the Judgment and Decree of the Trial Court, are erroneous on facts or on law and therefore, the same shall liable to be reversed or set aside. As per Rule 24, if the evidence on record is sufficient for the lower appellate Court to decide the case on merits, the lower appellate Court must decide the case by itself on merits. By remand, litigation is kept pending. While ordering remand, the lower appellate Court must follow the

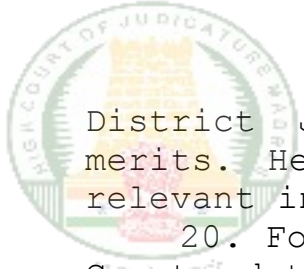
procedure laid down in Order 41 Rules 23 to 27 CPC, in order to avoid unnecessary pendency of cases.

16. In the present case, the appellant filed suit for specific performance based on the Ex.A1, agreement of sale alleged to have been executed by the respondent. The respondent denied her signature in Ex.A1 and contended that she never agreed to sell the property to appellant and she did not execute Ex.A1 agreement of sale and did not receive Rs.3,00,000/- from the appellant as advance. To prove that her signature is forged in Ex.A1, she summoned D.W.2 and D.W.3 Manager of State Bank of India, Perumalpuram and Deputy Manager of Indian Bank, Palayamkottai and marked Ex.B2 and Ex.B3. Account opening form. Ex.B2 is dated 27.09.2006 and Ex.B3 dated 28.03.1995. The learned Judge rejected Ex.B2 and Ex.B3 on the ground that they are not of contemporary period. Accepting the evidence let in by appellant, the suit was decreed. Against the said judgement and decree dated 04.02.2011, the respondent filed A.S.No.47 of 2013. She also filed I.A.No.114 of 2014 for sending the Ex.B2 and Ex.B3 for appointment of an Advocate Commissioner to produce the disputed signature in Ex.A1 with Ex.B2 and Ex.B3 to Tamil Nadu Forensic Science Laboratory, Chennai for comparison to get expert opinion or to send enlarged copies of Ex.A1, Ex.B2 and Ex.B3 for comparison.

17. The learned Judge considering all the materials on record came to the conclusion that the trial Court erred in taking the evidence on record, the proof affidavit of P.W.2 as the same was not duly attested as per law. As per the judgment relied on by the learned counsel for the appellant in 2006(1) Supreme Court Cases 75 (*Uday Shankar Triyar vs. Ram Kalewar Prasad Singh and another*), 2009(4) L.W. 494 (*N.P.Murugan vs. M/s.Himachale Pradesh Horticultural Produce Marketting and Processing Corporation*), AIR 1977 Punjab & Haryana 257 (*Smt.Mukhtiar Kaur, vs. Ghulab Kaur*) and AIR (39) 1952 Supreme Court 54 (*Rameshwar Kalyan Singh v. State of Rajasthan*) and Section 99 and Order 8 Rule 4 CPC, the evidence of P.W.2 cannot be rejected due to procedural lapse. P.W.2 on Oath reiterated his statement made in proof affidavit and he was cross examined by counsel for the respondent.

18. The respondent filed I.A.No.114 of 2014 for getting expert opinion with regard to disputed signature. The appellant resisted the said application. The learned Judge considering the rival contentions, allowed the said application. After allowing the said application, the learned Principal District Judge ought to have decided the appeal in A.S.No.47 of 2013 by himself on merits, after getting expert opinion with regard to disputed signature. The learned Principal District Judge has not properly exercised the power under Order 41 Rule 23 to 27 of Civil Procedure Code, when the materials on record are sufficient to decide the issues in question. The appellate Court should not remand the matter for fresh trial and prolonging the litigation.

19. The learned counsel for appellant and respondent relied on judgments referred to above and argued on merits of issues in the suit and first appeal. The Appeal Suit is remitted to Principal



District Judge, Tirunelveli for deciding the Appeal Suit on merits. Hence, the judgments relied on by the parties are not relevant in deciding the Civil Miscellaneous Appeal.

20. For the above reasons, the judgment of the lower appellate Court, dated 28.10.2014 made in A.S.No.47 of 2013 is set aside. The matter is remitted to the Principal District Court, Tirunelveli for deciding the A.S.No.47 of 2013 on merits after obtaining the expert opinion as ordered in I.A.No.114 of 2014.

21. In the result, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected miscellaneous Petition is also closed.

Sd/-
Assistant Registrar(CO)

/TRUE COPY/

Sub Assistant Registrar

am

To

1. The Principal District Judge, Tirunelveli,

2. The Principal Sub ordinate Judge, Tirunelveli

+1 cc to M/S.S.P.MAHARAJAN, ADVOCATE, SR NO:44965

+1 CC TO M/S.V.JEYARANI, ADVOCATE, SR NO:45078

JAM/SKS-RR/22.9.15/7P-5C

CMA. (MD) Nos.455 of 2015
07.08.2015