

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.10.2016

PRONOUNCED ON : 24.10.2016

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.16 of 2011

and

M.P.No.1 of 2011

Kaliya Perumal (died)

1. Lakshmi Ammal
2. Indiran
3. Chandiran
4. Assivalli
5. Vasantha
6. Latha
7. Manjula

...

Appellants

Vs.

Kelannji Ammal @ Kelannji

...

Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree in A.S.No.113/2005, on the file of the Subordinate Court, Villupuram and dated 24.09.2010 in confirming the judgment and decree in O.S.No.133 of 2003, on the file of the principal District Munsif Court, Tirukoilur and dated 11.08.2004.

For Appellants : Mr.V.Raghavachari

For Respondent : Mr.R.Balakrishnan

JUDGMENT

Challenge in this second appeal is made by the defendants against the Judgment and Decree dated 24.09.2010 passed in A.S.No.113 of 2005 on the file of the Sub-Court, Villupuram, confirming the Judgment and Decree dated 11.08.2004 passed in O.S.No.133 of 2003 on the file of the Principal District Munsif, Thirukoilur.

2. The suit has been laid by the respondent /plaintiff for declaration and permanent injunction.

3. The averments contained in the plaint are briefly stated as follows:

The suit property originally belonged to Government, being a Tharisu land and the plaintiff has been in possession and enjoyment of the suit property since 1990 and considering her possession and enjoyment over the suit property, Government issued patta in favour of the plaintiff and since then, the suit property has been in possession and enjoyment of the plaintiff. In the patta, instead of mentioning the plaintiff's father's name as Ramasamy, it has been wrongly mentioned

as Plaintiff's husband's name is Ramasamy. The defendants have no right, title or possession over the suit property and the defendants have lands to east of the suit property and inasmuch as the plaintiff refused to accede to the request of the defendants to give the suit property to them for sale, the defendants are attempting to interfere with the possession and enjoyment of the suit property and hence, the suit.

4. The averments in the written statement filed by the defendants are briefly stated as follows:

The suit property originally belonged to Government and it was Tharisu. The defendants have ancestral patta land to the East, adjacent to the suit property. Along with the patta lands, the defendants are in possession and enjoyment of the suit property also. The defendants' father, in the year 1960, dug a square shaped well, adjacent to the suit property, in his patta land and he dumped all mud in the suit property. Thus, the suit property had been in possession and enjoyment of the defendants' father by keeping trees and enjoyed the same. The sons of Ramasamy viz. Plaintiff's father-in-law, the defendant Kalaiya Perumal and Seva Kounder, were enjoying the suit

property along with their patta lands and they divided the patta lands and since the suit property is not fit for cultivation, they had been dumping mud in the suit property, while digging the Well and there were trees also in the suit property. While so, the plaintiff and her husband, without the knowledge of the defendants, got assignment of the suit property by giving false information. The plaintiff never had been in possession and enjoyment of the suit property either before the assignment or after the assignment. Seva Koundar sold his share to the first defendant and hence, the defendants have 2/3 share and the plaintiff has got 1/3 share in the patta lands. The plaintiff has filed a false case. Further, the suit is bad for non joinder of the necessary parties and hence, the suit is liable to be dismissed.

5. The averments, in the additional written statement, are briefly stated as follows:

The plaintiff is the daughter-in-law of the defendant's elder brother. The defendants have been in possession and enjoyment of the patta lands and also the suit property. Without measuring and inspecting the suit property, the assignment had been given to the plaintiff. Thasildar is also a necessary party to the suit. Hence, the

suit is bad for non joinder of necessary parties and the plaintiff is not entitled to claim the relief sought for and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case, PWs1 to 3 were examined and Exs.A1 to 8 were marked. On the side of the defendants, DWs1 to 4 were examined and Exs.B1 to 5 were marked and Exs.C1 and 2 were marked and Exs.X1 and X2 were marked.

7. On a consideration of the oral and documentary evidence adduced by the parties, the trial Court was pleased to decree the suit. The first appeal filed before the first appellate Court against the judgment and decree of the trial Court had come to be dismissed. Aggrieved over the judgment and decree of the Courts below, the present second appeal has been preferred by the defendants.

8. The second appeal came to be admitted on the following substantial questions of law:

(i). When the assignment in favour of the plaintiff had been cancelled by the revenue officials, are the courts below justified in overlooking the cancellation and decreeing the suit as prayed for?

(ii). In the absence of any proof to show the possession and enjoyment over the suit property, are the plaintiff entitled for any relief?

9. That the suit property was a Tharisu land belonging to the Government is not disputed. According to the plaintiff, she has been granted assignment in respect of the suit property and on the basis of the assignment order, she has claimed the relief of declaration and permanent injunction, on the footing that she is the owner of the suit property and that, the suit property has been in her possession and enjoyment. Therefore, the basis of the plaintiff's suit is assignment order given to her by the Government in respect of the suit property and the same has been marked as Ex.A1.

10. The defendants have taken a plea that the assignment given to the plaintiff had been obtained based on misrepresentation and wrong measurements and that, the suit property has been in possession and enjoyment of the defendants along with their patta lands. Further, according to the defendants, at the most, the plaintiff would be entitled to get only 1/3rd share in respect of the patta lands and the suit property and therefore, the plaintiff should be non suited.

11. The trial court decreed the suit as prayed for. The defendants preferred the first appeal. At that point of time, it is admitted by the parties concerned that the assignment granted to the plaintiff has been cancelled by RDO (Revenue Divisional Officer), Thirukovilur. So, while preferring the first appeal, the defendants have also preferred an application under Order 41 Rule 27 CPC to admit the cancellation order of the assignment as an Additional document in support of their case. However, their application has come to be rejected by the trial Court.

12. No doubt, the defendants have not preferred any separate appeal against the order of the first appellate court rejecting their application filed under Order 41 Rule 27 CPC. However, it is argued by the learned counsel for the appellants that as per Section 105 of the Code of Civil Procedure, the appellants while appealing against a decree, any error, defect or irregularity in any order passed by a Court in the exercise of its original or appellate jurisdiction, which affects the decision of the case, are entitled to set forth the same as a ground of objection in the memorandum of appeal. The above contention of the learned counsel for the appellants deserves acceptance. Even though they have not preferred any appeal against

the order, rejecting the application filed under Order 41 Rule 27 CPC, but still, as rightly argued, they are entitled to canvass the said order in the second appeal, which has been preferred against the decree passed by the first appellate court. It could be seen that the order of the first appellate court rejecting the application filed under Order 41 Rule 27 CPC has affected the decision of the case materially and went against the defendants. On account of the same, it could be seen that the defendants have also taken grounds with reference to the same in the memorandum of appeal, particularly, in ground Nos.6 and 7.

13. A perusal of the Judgment of the first appellate court would go to show that it has been in a state of confusion, as to whether it should admit or reject the additional evidence projected by the defendants/appellants, while disposing of the first appeal. This could be seen from the judgment of the first appellate court, while disposing of the application filed under Order 41 Rule 27 CPC in I.A.No.22 of 2008, though the first appellate Court has discussed and found that it is just and necessary to receive the document of cancellation of assignment Order as Additional document, thereafter, proceeded to hold that it is not necessary to invoke Order 41 Rule 27 CPC to receive the additional evidence and resultantly, dismissed the petition.

14. In such view of the matter, the first appellate Court should not have endeavoured to discuss about the merits or demerits of the additional evidence, while disposing of the main appeal. On the other hand, a perusal of the judgment of the first appellate court would go to disclose that even though it had rejected the application filed under Order 41 Rule 27 CPC taken out by the defendants, still it has proceeded to dwell upon the merits and demerits of the additional evidence sought to be projected by the appellants/defendants and the same could be gathered from reading para Nos. 15,17,20,21,and 22 of the first appellate Court's judgment. Therefore, it could be seen that on the one hand, the first appellate court had rejected the application filed under Order 41 Rule 27 CPC and in contradiction, it has also discussed the merits and demerits of the cancellation of the assignment order, while disposing of the main appeal, which, as rightly argued by the learned counsel for the appellants, is perverse and also erroneous. It could be seen that the appellants were denied the opportunity of projecting the facts vis-a-vis the additional evidence in the right perspective in the first appellate court. They were led to the impression that their application having been rejected by the appellate court, therefore, would not have been in a position to canvass about the merits of the additional evidence projected by them, before the

first appellate court, at the time of the arguments. Therefore, it could be seen that the appellants had been seriously prejudiced in projecting the case before the first appellate court. In such view of the matter, it could be seen that inasmuch as the rejection of application under Order 41 Rule 27 CPC has seriously affected the decision of the case rendered by the first appellate Court, the appellants are entitled to canvass the same in the memorandum of appeal before this Court. Accordingly, as found earlier, they have taken such a plea and put forth their grounds with reference to the same in this appeal.

15. It is strenuously argued by the learned counsel for the appellants that the plaintiff has sustained the suit based upon the assignment order granted in her favour. Admittedly, pending is the assignment order has been cancelled by the RDO. That fact has not been disputed by the plaintiff. It is also argued by the plaintiff's counsel that the plaintiff has preferred a revision, against the order of cancellation of the assignment, before the DRO and the same is pending. This fact has also been admitted by the appellants. Therefore, it could be seen that the revision preferred by the plaintiff against the order of cancellation of the assignment is pending before the DRO.

16. Despite all these facts, it could be seen that the first appellate court had erroneously not considered the application preferred by the appellants under Order 41 Rule 27 CPC lawfully and had, in a state of confusion, proceeded to hold that the said document is a vital document for the disposal of the appeal, however, finally, dismissed the application without assigning sufficient cause. It is contended by the appellants' counsel that as and when the case was heard by the first appellate court, the assignment granted in favour of the plaintiff had been cancelled and hence, the Plaintiff has no cause of action to sustain further and therefore, the first appellate court should have allowed the application under Order 41 Rule 27 CPC and taken up the document as additional evidence in support of the defendants' case and thereafter, proceeded to dispose of the appeal. On the other hand, as adverted to earlier, even though the first appellate Court has rejected the application of the defendants filed under Order 41 Rule 27 CPC, still proceeded to discuss the pros and cons of additional document viz., the cancellation of the assignment order projected by the defendants as additional evidence while disposing of the appeal. This has seriously, in my opinion, and as also argued by the appellants' counsel, prejudiced the appellants, in projecting their case, in the best manner.

17. It is argued by the respondent's counsel that pending lis, the revenue authorities are not entitled to cancel the patta and therefore, the cancellation of the assignment order granted in favour of the plaintiff by the RDO is without jurisdiction. In this connection, he placed reliance upon the decision reported in **2011 (5) CTC 94 (Vishwas Footwear Company Ltd., Vs. The District Collector, Kancheepuram and four others)**.

18. On the other hand, the counsel for the appellants contended that the above said decision would be applicable only in the case of patta granted based upon the registered document evidencing transfer of title and in so far as the present case is concerned, when the property was assigned by the Government, patta would be the only document for conferring the title to the suit property and in that case, the plaintiff filing the suit, based upon such a patta, would have no cause of action to sustain the suit after the cancellation and on that sole ground, the plaintiff should have been non suited by the first appellate court. With reference to the same, he placed reliance on the decision reported in **2012 (6) CTC 303 (Kesavan and others Vs.Muthu)**.

19. Be that as it may, in view of the above discussion, it could be seen that inasmuch as this Court is of the view that the first appellate court has erroneously and in a state of confusion rejected the application filed under Order 41 Rule 27 CPC and since it is found that the same is a vital document for the just decision of the case, in my considered view, the matter is required to be remitted back to the first appellate court for fresh consideration with a direction to the first appellate court to permit the appellants/defendants to mark the cancellation of the assignment order as an additional document in support of their case and after giving the respective parties, adequate opportunities of placing their submission on the merits and demerits of the additional document and thereafter, proceed to dispose of the appeal on merits.

20. In conclusion, the judgment and decree dated 24.09.2010 passed by the Subordinate Court, Villupuram, in A.S.No.113 of 2005 are hereby set aside and the matter is remanded back to the first appellate court with a direction to the first appellate court to permit the appellants / defendants to mark the order of cancellation of the assignment order as an additional document in support of their case and after providing the respective parties adequate opportunities to

putforth their submissions on the merits and demerits of the additional document and thereafter, proceed to dispose of the first appeal on merits and in accordance with law.

Accordingly the second appeal is disposed of. No costs.
Consequently, connected miscellaneous petition is closed.

24.10.2016

Index : Yes/No
Internet: Yes/No
sms

To

- 1.The Subordinate Court,
Villupuram.
2. The principal District Munsif Court,
Tirukoilur.

T.RAVINDRAN,J.

sms

Pre-delivery order in
S. A.No.16 of 2011
and
M.P.No.1 of 2011

24.10.2016