

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.04.2016

CORAM :

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

S.A.No.2006 of 2001

&

C.M.P.Nos.21008 of 2001 & 119 of 2010

Subbarayan ... Appellant/Appellant/Plaintiff

Vs.

1.Kulandaivel

2.Kandaswamy

3.Rathinavel

... Respondents/Respondents/Defendants

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 22.06.2001 and made in the appeal in A.S.No.123 of 98 on the file of the Subordinate Court, Kallakurichi, confirming the judgment and decree dated 17.09.98 and made in the suit in O.S.No.30 of 91 on the file of the Second Additional District Munsif Court at Kallakurichi.

For Appellant : Mr.R.Sunil Kumar Sundar Narayan

For R1 : Mr.S.Sounthar

RR2 & 3 : NA

सत्यमेव जयते
J U D G M E N T

Challenge in this Memorandum of Second Appeal has been made to the Judgment and decree dated 22.06.2001 and made in the appeal in A.S.No.123 of 98 on the file of the learned Subordinate Judge, Kallakurichi, confirming the judgment and decree of the trial Court dated 17.09.98 and made in the suit in O.S.No.30 of 91 on the file of the learned second Additional District Munsif at Kallakurichi.

2. The plaintiff in the suit is the appellant and the defendants 1 to 3 are the respondents.

3. Heard Mr.R.Sunil Kumar Sundar Narayan, learned counsel appearing for the appellant/plaintiff and Mr.S.Sounthar, learned counsel appearing for the first respondent/first defendant.

4. Despite service of notice to the respondents 2 and 3, they have not chosen to appear either in person or through their respective counsels.

5. The appellant has filed the above suit as against the respondents seeking the following reliefs:

(i)For declaration of his title over the suit schedule mentioned property.

(ii)For permanent injunction to restrain the defendants and their men in any manner interfering with his possession and enjoyment of the suit 'A' schedule property.

(c)For permanent injunction to restrain the defendants and their men from in any manner interfering with his user and enjoyment of 'B' schedule property as a pathway.

6. This suit was resisted by the respondents/defendants. On appreciation of the evidences both oral and documentary, the learned trial Judge had proceeded to dismiss the suit on the ground that:

(a)the suit 'A' schedule property has not been properly identified with proper boundaries.

(b)No proper documentary evidences are adduced to substantiate the fact that the suit property measuring to an extent of 50 cents has been in possession and enjoyment of the appellants/plaintiffs?

7. Having lost his suit before the trial Court, the appellant had preferred an appeal in A.S.No.123 of 98 on the file of the learned Subordinate Judge, Kallakurichi. That appeal was also dismissed confirming the judgment and decree of the trial Court on the ground that the appellant/plaintiff had not satisfactorily substantiated his case as to how he came to be in the ownership of the suit property measuring to an extent of 50 cents, which is described in Ex.A3, as his brothers have also become the legal heirs alongwith the plaintiff, after the death of their mother Pavaiammal.

8. Secondly, the first Appellate Court has also found that the plaintiff is not entitled to any extent of land more than the land measuring 1 acre, 0.42 cents comprised in the suit survey number. Having been aggrieved by the dismissal of the appeal, the plaintiff stands before this Court with this second Appeal.

9. This Second Appeal is admitted based on the following substantial questions of law:

(a) Whether the Court below did not err in refusing the declaratory relief in respect of 'A' schedule on the basis of a cogent source of title through registered documents namely Ex.B1, Ex.A3 and A4?

(b) Whether the grant of patta comprised in survey No.153/4C2, with reference to suit property, itself a sufficient evidence of title in favour of plaintiff or whether the same was not sufficient after re-survey to secure the relief against the defendant?

(c) Whether the reference to 'pattai' in Ex.B1 did not constitute an admission against the defendant for proof of its existence to enable the plaintiff to obtain the relief sought for by him?

10. Along with the second appeal, the appellant/plaintiff has filed a petition in C.M.P.No.119 of 2010 under Order 41, Rule 27 of C.P.C. seeking permission of this Court, to receive the following documents as additional documentary evidence on his behalf in the present Second Appeal.

S.No.	Date	Description	
1	28.12.2001	Field map of survey No.73, after the cancellation of the sub-division	Certified copy
2.	23.04.1992	Objection submitted by the petitioner to the Tahsildar	Original
3.	10.06.1992	Proceedings of the District Surveyor, Cuddalore with the cover.	Original
4.	28.12.2001	Adangal extract in respect of Survey No.153 for the Fasli 1393	Original
5.	28.12.2001	Adangal extract in respect of Survey No.153 for the Fasli 1394	Original
6.	28.12.2001	Adangal extract in respect of Survey No.153 for the Fasli 1395	Original
7.	28.12.2001	Adangal extract in respect of Survey No.153 for the Fasli 1396	Original

Description of Property:

In Kallakurichi Taluk, Sadayampattu Village Patta No.131, Dry R.S.153/4C2- 0-19-1 Ars, Asst, Re.0.52 paise.

'B' Schedule

In Kallakurichi Taluk, Sadayampattu Village-the property used as Pattai in Dry R.S.153/4B/3 measuring 2 Meters in length on the west, 4.8 meters on the east and 35.4 meters long along East-West.

11. In his affidavit filed in support of the petition, the appellant has stated that the parties were in enjoyment of their respective segment of their properties, pursuant to the sub division viz., survey numbers.153/4C2, 6, 7 & 8 which were in existence even at the time of filing of the suit. Only thereafter on the surreptitious move of the respondents, the sub division in respect of the above survey numbers was cancelled by the Tahsildar concerned, in his proceedings No.A.10/6784/92 dated 19.05.1992 and the entire extent was classified as single survey number namely 153/4C2. He has stated that before cancellation of the sub division, chitta, adangal, A- register contained the names of the respective parties who are in enjoyment of each survey number.

12. The appellant has also stated that the moment when he came to know about the cancellation of the sub division, he had filed his objection seeking restoration, but his objection was rejected by the Tahsildar on the ground of pendency of suit. He has further stated that the suit was mainly dismissed placing reliance upon the survey numbers which might have come into existence, after the cancellation of the sub division and therefore, he has sought leave of this Court to permit him to produce the survey numbers pertaining to the period when the suit was filed.

13. As already observed in the opening paragraphs, the Courts below have given concurrent findings saying that :

(a) the suit property has not been properly identified,
(b) No legal and acceptable documentary evidences are produced on behalf of the appellant/plaintiff to substantiate the fact that he had been using and enjoying the suit 'B' schedule property.

14. Before we go into the merits of the case, it may be appropriate to make reference to paragraph No.7 of the affidavit filed by the appellant/plaintiff in support of his petition under Order 41, Rule.27. Paragraph No.7 is extracted as under:

'Since the decision in the suit and the appeal was arrived at primarily on the basis of the documents emanated after the filing of the suit and after the sub division was cancelled, naturally the said documents were not sufficient for the proper disposal of the issue as they did not contain the details required for the fair disposal of the proceedings. The documents containing the details of separate existence of survey numbers and enjoyment of properties were not available at the time of the disposal of suit. The filing of the following documents as additional evidence is essential and the documents were obtained from the revenue officials recently and its authenticity cannot be doubted. The marking of the document will not cause any prejudice to the respondent and on the other hand, refusal to mark will cause great prejudice and enormous loss to me.'

15. The appellant himself has admitted in the above said paragraph that the documents which were exhibited and marked on his behalf before the Court below were not sufficient for the proper disposal of the suit or to grant the declaratory decree in respect of his title over the suit property. He has admitted that those documents were coming into existence after filing of the suit. Naturally, he has therefore, considered that both the Courts below have come to the correct conclusion that he is not entitled to the relief claimed by him in this suit. According to him, the documents which are sought to be received through the petition in CMP.No.119 of 2010, were in existence, even prior to the filing of the suit. If it is so, he has to show as to what prevented him from availing those documents and getting them marked during the trial of the suit. Secondly, it is palpable that the existence of the documents which are sought to be produced in the second appeal was known to the appellant/plaintiff. However, during the time of trial proceedings, he had not evinced any interest to collect those documents from the concerned Authority.

16. Order 41, Rule.27 of the Code of Civil Procedure 1978 is extracted as under:

Rule 27. Production of Additional evidence in Appellate Court.-(1)The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

17. Order 41, Rule 27 contemplates the production of additional evidence in Appellate Court. Sub-rule 1 consists of two portions. Insofar as the first portion is concerned, it is mandatory in nature. Insofar as the second portion is concerned, it is discretionary in nature. The first portion mandates that the parties to appeal shall not be entitled to produce additional evidence whether oral or documentary in the Appellate Court. The rigorism of the first portion has been relaxed to certain extent in the second portion. The second portion also specifies the circumstances under which the Appellate Court may allow such evidence or document to be produced or witness to be examined. Under Clause (a) of sub-rule 1, it is envisaged that if the Court from whose decree, the appeal is preferred has refused to admit evidence which ought to have been admitted.,

18. Clause ('aa') says that if the person who is seeking to produce the additional evidence establishes that notwithstanding the exercise of his due diligence, such evidence was not within his knowledge or despite his exercise of due diligence, they were not able to be produced by him at the time of trial proceedings.

19. Clause (b) provides that if the Appellate Court requires any documents to be produced or witness to be examined it may allow such evidence or documents to be produced or witness to be examined.

20. It is entirely depending upon the discretionary powers of the court and if the court requires any document to be produced or witness to be examined for the better disposal of the suit or for answering substantial questions of law effectively, it may allow such evidence or documents to be produced. However as contemplated under sub rule 2, the court shall have to record the reasons for so doing.

21. Insofar as this case is concerned, Clause '(a)' to sub rule 1, does not apply. Clause(aa) is the appropriate provision which is applicable to the instant case. However, the appellant/plaintiff has not complied with the requirements of this Clause. He has never stated in his affidavit that notwithstanding the exercise of his due diligence, he was not able to produce the documents which are sought to be produced in this second appeal. Therefore, this petition is liable to be dismissed, in view of the provisions of sub rule -1. Hence, the petitioner shall not be entitled to produce the additional documentary evidence which are sought to be produced.

22. As afore stated, since the appellant/plaintiff himself has stated that the documents produced and marked on his behalf were originated subsequent to the filing of the suit and he himself has conceded in paragraph No.7 of his affidavit that naturally the said documents were not sufficient for the proper disposal of the issues which were formulated by the trial Court, the second appeal itself is not maintainable.

23. Mr. R. Sunil Kumar, learned counsel for the appellant, in support of his contention has placed reliance upon the decision of the Hon'ble Division Bench of this Court reported in 2012(3) CTC(160) between Venkatasubramania Chettiar(died) and Others Vs. Perumal Chettiar and Others. In paragraph No.26, it is observed as follows:

"additional documents produced are relevant for determination of the issues arising between the parties. Parties did not seem to have grasped the significance of producing the documents in the trial Court. In such circumstances, additional evidence cannot be refused on the ground that they did not produce it in the trial Court. As discussed earlier, decision of the trial Court on the preliminary point of Ex.B1, unregistered Partition Deed has been set aside. Since the trial Court did not look into Ex.B1, unregistered Partition Deed, Trial Court did not analyse the oral evidence adduced by the parties. Additional documents produced are sale deeds, Chitta and

Adangal issued by the Village Administrative Officer concerned. Trial Court has not recorded its finding on the other points raised by the defendants. Considering the additional evidence produced, it is appropriate that the judgment of the trial Court is to be set aside and the matter is to be remitted back to the trial Court.'

24. This Court has given due consideration to the above paragraph and finds that this is not made applicable to the instant case on hand. Further, the suit itself appears to have been filed on 07.01.1991. Both the Courts below have categorically stated that the available documents are not sufficient to grant the reliefs sought for by the appellant/plaintiff. Further the requirements of Clause (aa) of Sub Rule 1 of Rule 27 to Order 41 have not been complied with by the appellant. As envisaged under Clause(a) of Sub Rule 1, the appellant/plaintiff had not filed any petition under Order 41, Rule 27, before the I Appellate Court, to receive the additional documents which are sought to be produced in this Second Appeal. Only after the Courts below, which includes the first Appellate Court have given their finding that these documents which were marked during the trial proceedings were not sufficient to grant the reliefs sought for, the appellant has chosen to file the petition in C.M.P.No.119 OF 2010 under Order 41, Rule 27, along with this Second Appeal, seeking leave of this Court, to receive the additional documents which are sought to be produced. That cannot be allowed to fill up the lacuna, as the appellant himself has admitted that at the time of filing of the suit, no appropriate documents were produced to support this claim.

25. Since the Courts below have given concurrent findings, this Court being the second Appellate Court, does not see any reason to interfere. Accordingly, the Second Appeal is dismissed. The judgment and decree of the Courts below are confirmed. Consequently, the petition in C.M.P.No.119 of 2010 is dismissed and the other connected miscellaneous petition is closed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

dn

To

1. The Principal Subordinate Judge,
Kallakurichi.
2. The Second Additional District Munsif,
Kallakurichi.
3. The Section Officer,
V.R.Section,
High Court, Madras.

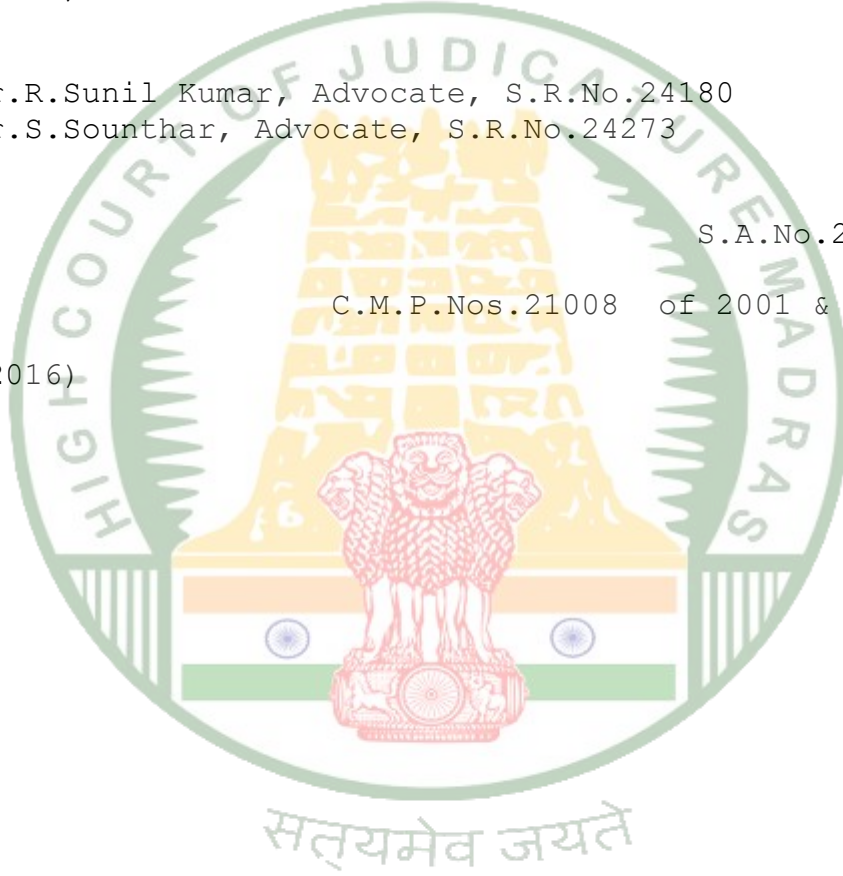
+1cc to Mr.R.Sunil Kumar, Advocate, S.R.No.24180

+1cc to Mr.S.Sounthar, Advocate, S.R.No.24273

S.A.No.2006 of 2001
&

C.M.P.Nos.21008 of 2001 & 119 of 2010

VGI (CO)
CA(05/07/2016)



WEB COPY