

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.12.2001

PRONOUNCED ON: 11.12.2017

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A. No.1096 of 2001

1. Anandan (deceased)
2. Samatha
3. Dhanalakshmi
4. Vedhavalli
5. Amutha
6. Karthick
7. Sankar
8. Pandiyan
9. Kali

(Appellants 2 to 9 brought on record as Lrs of deceased sole Appellant vide order of this Court dated 19.01.2017 made in CMP 2570 to 2572/2016 in S.A.1096/2001)

... Appellants

Vs.

1. Kannaiyan
2. Chinnaiyan
3. Egavelu

... Respondents

Prayer:- Second Appeal is filed under Section 100 of C.P.C., against the judgment and Decree dated 30.11.2000 made in A.S.No.83 of 2000 on the file of the Principal District Court, Tiruvannamalai reversing the Judgment and decree dated 31.01.2000 made in O.S.No.305 of 1987 on the file of the District Munsif Court, Polur.

For Appellants	: Mr.V.Raghavachari
For Respondent Nos.1 & 2	: No appearance
For Respondent No.3	: Mr.S.Udayakumar for M/s.P.N.Peruvazhuthi

J U D G M E N T

Challenge in this second appeal is made to the judgment and Decree dated 30.11.2000 made in A.S.No.83 of 2000 on the file of the Principal District Court, Tiruvannamalai reversing the Judgment and decree dated 31.01.2000 made in O.S.No.305 of 1987 on the file of the District Munsif Court, Polur.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit has been laid by the plaintiff for declaration and permanent injunction.

4. One of the substantial questions of law formulated at the time of admission of the second appeal is

" Whether the lower appellate Court is right in relying upon Exs.B6 to B10, which had not been proved and established?"

5. Considering the points raised, during the course of arguments, in the second appeal, in my considered opinion, it is unnecessary to deal with the facts of the case in detail as for the reasons below mentioned, it is proposed to remit the matter back to the first appellate Court and in such view of the position, any finding or determination by this Court on the points in issue raised in the suit one way or the other either incidentally or directly during the course of the this appeal would seriously prejudice the case of either parties and in such view of the matter, without going into merits of the case one way or the other, on a legal point, the second appeal is intended to be disposed of.

6. It is found that the plaintiff had succeeded in the trial Court. Aggrieved over the same, the defendants have preferred the first appeal. It is further seen that during the pendency of the first appeal, the defendants have preferred an application in I.A.No.132/2000 under Order 41 Rule 27 CPC for the reception of the additional

evidence in support of their case contending that the additional evidence projected would establish their defence version and as they were unable to produce the same before the trial Court, they had been necessitated to file the same during the course of appeal and hence, the petition.

7. It is seen that the plaintiff has not filed any counter in the said application as seen from the notings of the first appellate Court in the said petition and accordingly, the first appellate Court has proceeded to allow the application above stated on 28.11.2000 and it is thus found that prior to the disposal of the first appeal on 30.11.2000, I.A.No.132 of 2000 has come to be allowed by the first appellate Court on 28.11.2000 itself based on the fact that no counter has been filed by the plaintiff. It is further seen that the first appellate Court has also proceeded to mark the additional evidence viz., Exs.B6 to 10 in support of the defendants' case and it is seen that the appellate Court has received the documents and exhibited the same as Exs.B6 to B10 by consent and accordingly, it has entertained the petition on 28.11.2000. However, as vehemently contended by the plaintiff's counsel, even assuming that the plaintiff has not filed any counter in the application for the reception of additional evidence, still, it is

argued by him that despite the said position, the appellate Court should have given reasons that the additional evidence projected are necessary for enabling him to pronounce judgment in the first appeal or for any other substantial cause and also the first appellate Court should have also determined as to whether the defendants had been precluded from producing the additional evidence during the course of trial, despite their due diligence. However, as regards the above points required to be determined by the first appellate Court at the time of reception of the additional evidence as mandated under Order 41 Rule 27 CPC, it is seen that the same is not adhered to and on the other hand, proceeded to entertain the above said application on the footing that no counter has been filed by the plaintiff. Be that as it may, even if no counter has been filed, it is incumbent and necessary on the part of the first appellate Court to give reasons for accepting the additional evidence one way or the other as contemplated /mandated under Order 41 Rule 27 CPC. In any event, it is seen that on counter not being filed by the plaintiff, the above said application has come to be allowed. To that extent, it can be seen that there no serious prejudice has occasioned to the plaintiff in the first appellate Court entertaining the petition for the reception of additional evidence. However, as seen supra, in the said petition, no endorsement has been

obtained from the counsel for the plaintiff or the plaintiff as the case may be that he gives consent for marking the said documents as additional evidence without any proof of the contents of the same. When the plaintiff or his counsel has not made any endorsement for marking the documents by consent, it is found that the first appellate Court had erred in proceeding to mark the said documents as if the plaintiff has no objection to the same being marked by consent. On the other hand, it is found that merely on the footing that the plaintiff has not filed the counter in the application, it cannot be held that he also has no resistance or objection to the truth of the documents or the contents of the documents projected as additional evidence. Even if they are allowed to be marked by consent, as rightly argued, the defendants are not dispensed with the duty of establishing the contents of the documents produced by them as additional evidence in the manner known to law. Accordingly, it is seen that neither the plaintiff's counsel nor the plaintiff has admitted the truth and validity of the additional evidence produced by the defendants and have also not accepted specifically the contents of the documents produced as additional evidence. Even if the appellate Court had proceeded to entertain the additional evidence, on the basis that no counter has been filed by the plaintiff, still, it is seen that, as rightly argued, the

appellate Court should have proceeded to direct the parties concerned to adduce oral and documentary evidence, if any, with reference to the documents admitted as additional evidence and after enabling the party to adduce oral and documentary evidence with reference to the genuineness of the said documents only thereafter should have proceeded further whether to rely on the additional documents in support of the defendants' case or reject the additional documents in support of the plaintiff's case. In this connection, it is seen that a duty is cast upon the appellate Court that wherever additional evidence is allowed to be produced, the appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the appellate Court as provided under Order 41 Rule 28 of CPC.

8. Further, as per Order 41 Rule 29, where additional evidence is directed or allowed to be taken, the appellate Court shall specify the points, to which, the evidence is to be confined and record on its proceedings the points so specified. However, in so far as the present case is concerned, it is found that without any basis whatsoever, the appellate Court has proceeded to mark the additional evidence by

consent without any such consent having been given by the plaintiff or his counsel and even assuming that such a consent has been given, it cannot be inferred that the plaintiff has admitted the contents of the documents straightaway without any proof of the same on the part of the defendants. It is found that whether the plaintiff put forth objections or not to the additional evidence, it is incumbent upon the defendants to establish the validity of the documents projected as additional evidence and for the determination of the same, as rightly argued, it is found that necessary oral/documentary evidence should have been directed to be adduced by the respective parties with reference to the same and only thereafter, the first appellate Court should have endeavoured to proceed further in the matter and accordingly, dispose of the appeal one way or the other.

9. On the other hand, it is found that without adhering to the above said mandatory requirements, the first appellate Court has proceeded to mark the additional evidence by consent, when in fact no consent has been given by the plaintiff and that apart, it is found that the first appellate Court has only relied upon the additional evidence marked as Exs.B6 to 10 and accordingly, relying upon the contents found in the said documents without affording an opportunity to the

plaintiff to cross examine the defendants with reference to the genuineness of the said documents one way or the other, proceeded to dispose of the appeal. This approach of the first appellate Court is found to be not consistent with law as discussed above and therefore, it is seen that serious and irreparable harm and prejudice has been caused to the plaintiff in the approach of the first appellate Court in the way, it had disposed of the appeal, particularly, mainly depending only upon the additional evidence without providing an opportunity to the plaintiff to test the veracity of the additional evidence by cross examining the defendants apropos of the same.

10. In the light of the above position, it is found that inasmuch as the impugned judgment of the first appellate Court is mainly based upon the additional evidence and not on the other materials placed on record and thereby, it had set aside the judgment and decree of the trial Court , it is seen that the additional evidence relied upon by the first appellate Court having been marked by consent when in fact the plaintiff has not given any consent to the same and further when the plaintiff has not been provided with an opportunity to test the veracity or the truth of the said document by cross examining the opponent party, the judgment and decree of the first appellate Court cannot be

allowed to sustain further and accordingly, it is seen that the same is liable to be set aside and the matter has to be remitted back to the first appellate Court to rehear the appeal after providing an opportunity to the parties concerned to adduce evidence with reference to the additional evidence projected and thereafter, proceed to dispose of the appeal in accordance with law.

11. In support of his contentions as to the procedural errors committed by the first appellate Court, the counsel for the appellant placed reliance upon the decision reported in **2007 – 2 – L.W.999 (T.Tamilarasan Vs. Arokkiasamy & 2 others)**. The principles of law adumbrated in the above said decision are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

12. In the light of the above discussions, the judgment and decree of the first appellate Court dated 30.11.2000 made in A.S.No.83 of 2000 are set aside and the matter is ordered to be remitted back to the first appellate Court with a direction to the first appellate Court to take the first appeal on file and thereafter, provide an opportunity to both parties to adduce evidence with reference to

the additional evidence received by it and thereafter, after giving further opportunity to both parties to place their submissions on the merits of the appeal and dispose of the appeal as per law as expeditiously as possible. Accordingly, the second appeal is disposed of. No costs. Consequently, connected miscellaneous petition, if any, is closed.

11.12.2017

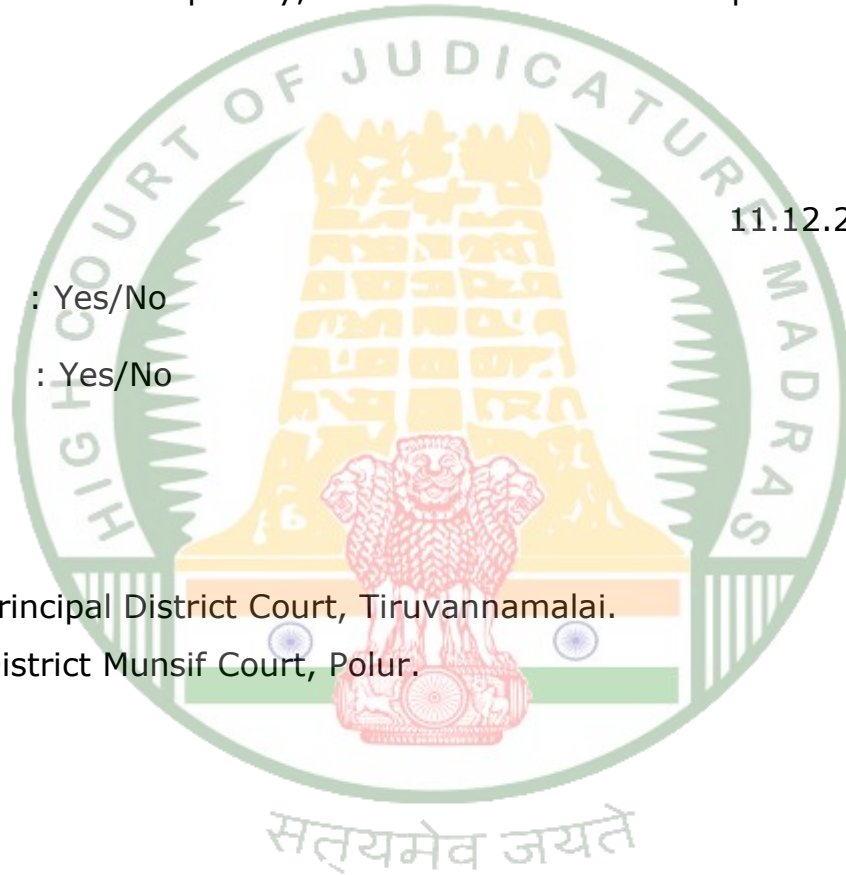
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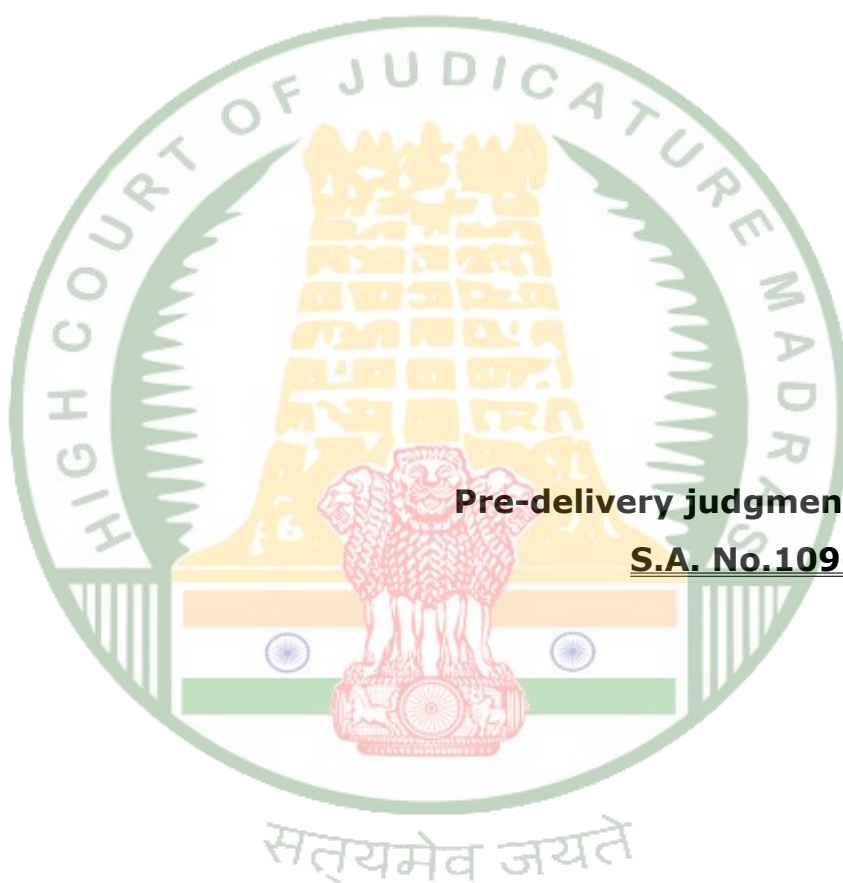
1. The Principal District Court, Tiruvannamalai.
2. The District Munsif Court, Polur.



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T.RAVINDRAN, J.

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**Pre-delivery judgment made in
S.A. No.1096 of 2001**

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