

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 31.10.2017

PRONOUNCED ON : 29.11.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.938 of 2001

1. Muthuswami
2. Palaniswami ...Appellants/Appellants/Plaintiffs

(The 1st plaintiff died after AS decree)

Vs.

1. Kulandaiammal
2. Premavathy
3. Natarajan
4. Deivanaammal
5. Thangamuthu
6. Arunachalam
7. Muthuswami
8. Subramani
9. Balachamy
10. Subramani
11. Palaniswami
12. Kulandaiswami
13. Palaniswami
14. Ponnuswami Gounder
15. Rasu alias Thangarasu
16. Arukkani
17. Baby alias Premavathy

... Respondents/Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree of the Subordinate Judge, Dharapuram, made in A.S.No.53 of 1999 dated 09.10.2000 confirming the decree and judgment of the District Munsif Court, Kangeyam, made in O.S. No.306 of 1998 dated 28.10.99.

For Appellants : Mr.C.Prakasam
For Respondent Nos.
1 to 4 & 6 : Mr.N.S.Sivakumar
For Respondent No.5 : No appearance
For Respondent Nos.
7 to 17 : Given up

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 09.10.2000, passed in A.S.No.53 of 1999, on the file of the Subordinate Court, Dharapuram, confirming the judgment and decree dated 28.10.1999, passed in O.S.No.306 of 1998, on the file of the District Munsif Court, Kangeyam.

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

3. Suit for declaration and permanent injunction.

4. The plaintiffs have laid the suit against the defendants for declaration that they have got the right of pathway marked as ABCD to the extent of 8 feet breadth and 1000 feet length north south in survey nos. 251, 252, 252B(2), 252B(3), 252(C) & 257 and permanent injunction restraining the defendants from restricting them from taking water from the well in survey no. 264C through the channel pipeline underneath the earth of the above said pathway and use the same as a cart track and pathway.

5. The defendants have filed the written statement contesting the case of the plaintiffs in all aspects and urged that the plaintiffs are not entitled to the reliefs claimed in the suit.

6. In support of the plaintiffs' case PWs 1 and 2 were examined, Exs.A1 to A13 were marked and on the side of the defendants, DWs 1 and 2 were examined, Exs. B1 to B16 were marked and Exs.C1 and C4 were also marked.

7. The trial Court, on the appreciation of the materials placed, both oral and documentary evidence and the submissions made, was pleased to dismiss the suit laid by the plaintiffs. The first appeal preferred by the plaintiffs was also dismissed confirming the judgment and decree of the trial Court. Aggrieved over the same, the present second appeal has come to be preferred .

8. At the time of the admission of the second appeal, the following substantial questions of law were formulated for consideration:

1. Whether having allowed I.A.No.3/2000 filed by the plaintiffs and allowing 15 documents as additional evidence, the judgment of the lower appellate Court is vitiated by failure to consider these documents?
2. Whether the lower appellate Court has failed to consider that the trial Court has dismissed the plaintiffs' suit for not filing the documents filed as additional documents in the first appellate Court.

9. Inasmuch as I intend to dispose of the second appeal, on the substantial questions of law formulated as above referred to, I deem it unnecessary to dwell or expatiate about the facts of the parties in detail and also I deem it not fit, in the interest of justice, to discuss about the merits of the case of the respective parties, as the determination of the substantial questions of law formulated in the matter, as such, do not require the discussion of the merits of the case, at this stage of the matter, as any discussion or the determination of the merits of the case, at this stage of the matter, in my considered opinion would affect the case of the either parties, as I intend to remit the matter back to the first appellate Court for the consideration of the matter afresh for the reasons below stated.

10. On a perusal of the materials placed, it is seen that pending appeal, the plaintiffs had preferred an application before the first appellate Court in I.A. 3/2000 under Order 41 Rule 27, Order 13 Rule 2 and Section 15 of the code of Civil Procedure for the reception of the additional documents, in support of their case and in the said petition, according to the plaintiffs, as the trial Court had negatived their suit, on the footing that they had not produced necessary documents to sustain and prove their case and as the documents necessary and essential for establishing their case had been obtained by the plaintiffs from the Court, on the withdrawal of the earlier suit laid by them against the defendants in O.S. 94/88, on the file of the District Munsif Court, Kangeyam and after getting instructions of their erstwhile counsel, as they had obtained the records relevant to sustain their case and accordingly, it is putforth by the plaintiffs that the said documents are required to be marked as additional evidence in support of their case and accordingly, preferred the above said application in the first appellate Court.

11. It is found that notice had been given to the defendants in the said application and the defendants have also filed counter contending that the application had been laid by the plaintiffs only to delay the appeal proceedings and the documents filed along with the petition are unnecessary for determining the issues involved between the parties and the plaintiffs have also not conformed to the conditions stipulated under Order 41 Rule 21 of the code of Civil Procedure for the reception of the additional evidence and hence, the petition is liable be dismissed.

12. It is found that along with the above said petition, the plaintiffs have enclosed 15 documents as additional evidence for supporting their case. It is further found that in the above said application, due enquiry was conducted by first appellate Court and accordingly, on 04.7.2000, the first appellate Court has passed the order that the relevancy and the admissibility of the documents can be decided later and accordingly, allowed the petition and as such, received the documents preferred by the plaintiffs by way of the above said petition. It is thus found that the first appellate Court has deemed it fit and necessary to receive the documents as additional evidence, in support of the plaintiffs' case and accordingly, entertained the above said application subject to the rider that the relevancy and admissibility of the documents would be determined later. It is seen that as such the application had been ordered on 04.7.2000 and it has been disposed of well before the disposal of the first appeal. The first appellate Court should have disposed the said application along with the first appeal. However, before the disposal of the first appeal, the first appellate Court thought it fit to dispose the application and accordingly, entertained the application.

13. In such view of the matter, as a follow up measure, the first appellate Court accordingly should have considered the relevancy and admissibility of the documents, during the course of the appeal proceedings and accordingly, should have discussed about the same, during the course of the judgment and accordingly, either should have accepted and relied upon the said documents or should have rejected the documents as not touching upon the merits of the case and accordingly disposed of the appeal on merits. However, it is found that the first appellate Court has not at all discussed any thing about the additional documents already entertained by it, by way of the above said application by order dated 04.7.2000 and it is seen that inasmuch as the said documents had already been ordered to be received, the first appellate Court should have given the list of documents as appendix in the judgment, as additional evidence marked on the side of the plaintiffs. However, it is seen that the judgment of the first appellate Court does not

carry any index to the marking of the above said documents / evidence, in support of the plaintiffs' case and it is seen that as adverted above, there is completely nil discussion about the merits of the documents one way or the other and it is seen that the first appellate Court has completely ignored the said documents and proceeded to dispose of the appeal, only with the available documents already on record.

14. As seen above, challenging the judgment and decree of the first appellate Court, confirming the judgment and decree of the trial Court, the second appeal has come to be preferred. Accordingly, the plaintiffs, aggrieved over the above approach of the first appellate Court, in not considering the pros and cons of the additional evidence produced by them along with the I.A. No. 3/2000, made a grievance about the same, in this Court and accordingly this Court, while admitting the second appeal had framed substantial questions of law touching upon the above said issue as above referred to. It is thus found that the substantial questions of law formulated in this second appeal by this Court point to a glaring error committed by the first appellate Court, in the disposal of the first appeal ignoring the order already passed by it in I.A.No. 3/2000, by failing or refusing to consider the additional documents produced by the plaintiffs in support of their case.

15. As regards the application of Order 41 Rule 27(1) and (2) of the code of Civil Procedure is concerned, it is seen that as the first appellate Court has already determined the applicability of the above said Section and finding that the parameters detailed thereunder having been satisfied by the plaintiffs, accordingly allowed the application preferred by the plaintiffs and thereby chosen to receive the documents produced as additional evidence. As against the order passed in I.A.No. 3/2000, it is seen that neither appeal nor revision had been filed challenging the same. Be that as it may, the merits of the application under Order 41 Rule 27 having already been determined in favour of the plaintiffs, it is seen that when the additional evidence is ordered to be received, as in this case, the appellate Court may either take such evidence or direct the Court from whose decree the first 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 the code of Civil Procedure. The appellate court has failed to adhere to the above said mandatory provisions. In fact, it has completely ignored to receive the additional evidence already entertained by it and failed also to mark the additional evidence in the appendix of the judgment pronounced by it. That apart, when I.A. No. 3/2000 has been entertained by the first appellate Court and the documents are ordered to be received, it is seen that as per Order 41 Rule 29, where the

additional evidence is directed or allowed to be taken thereupon, the appellate Court is required to specify the points to which the evidence is to be confined and record on its proceedings the points so specified. However, the above mandatory provisions have also not been complied with by the first appellate Court and as seen above, it has completely not taken into consideration, the additional evidence produced by the plaintiffs and entertained by it and it is thus seen that the first appellate Court having failed to adhere to the mandatory directions under Order 41 Rule 28 & 29 of the code of Civil Procedure and proceeded to dispose of the appeal with the available materials already on record, as rightly put forth by the plaintiff's counsel, has resulted in a serious miscarriage of justice and on the above score alone, as rightly argued and in my considered opinion also, the judgment and decree of the first appellate Court cannot be sustained any further. It is found that once, when the appellate Court has decided to entertain the application filed under Order 41 Rule 27 and accordingly, received the documents, it is incumbent upon the appellate Court to decide the merits of the additional evidence, one way or the other and accordingly, pronounce the judgment on the merits of the case in toto. On the other hand, having ordered the additional evidence to be received as evidence and failing to consider the same during the course of judgment and also mark the same as additional documents in the appendix of the judgment, it is seen that there is a glaring manifest of injustice committed in the approach of the first appellate Court and therefore it is seen that the matter is required to be remitted back to the first appellate Court for the consideration of the matter afresh on the merits of the case.

16. It is argued by the defendants' counsel that the substantial questions of law formulated in this second appeal are not substantial questions of law and as such, they being centering on pure questions of facts, which had already been determined by the Courts below without perversity or irregularity, it is contended that this Court should also ignore the said documents and proceed with the available materials on record. However, it is seen that in the light of the above discussions, when a serious error had been committed by the first appellate Court in the approach of the matter and had also pronounced the judgment without considering the merits of the case based on the available materials as ordered by it, by way of entertaining I.A.No. 3/2000, in my considered opinion, the substantial questions of law formulated in this second appeal are not touching upon the pure facts involved in this matter, as contended by the defendants' counsel and on the other hand, it is seen they constitute valid substantial questions of law to be determined on priority for the reasons stated supra.

17. It is found that in case the first appellate Court deems it fit and necessary that the reception of the additional documents require further evidence, it is for the first appellate Court to proceed with the matter accordingly, and resultantly, give necessary directions either to the trial Court or if it deems fit, the first appellate Court itself can take up the additional evidence, as regards the additional documents entertained and accordingly dispose of the matter on merits. In such circumstances, this Court cannot straight away sitting at the second appeal stage, discuss on the merits of the additional evidence, as the determination by this Court on the additional evidence, one way or the other, would result in either of the parties losing the opportunity to canvass the same in this Court. Therefore, it is seen that the merits of the additional evidence, in my considered opinion, cannot be decided by this Court at this second appeal stage, before the same had been determined one way or the other by the first appellate Court. In such view of the matter, only the first appellate Court, which had entertained the additional evidence produced by the plaintiff, would be competent to decide the merits of the additional evidence one way or the other.

18. In the light of the above discussions, the judgment of the first appellate Court is found to be vitiated by its failure to consider the additional evidence produced by the plaintiffs and entertained by it, by way of allowing I.A.No. 3/2000 and the first appellate Court should have considered the merits of the additional evidence one way or the other and as the failure of the first appellate Court in not considering the same, had resulted in a serious miscarriage of justice, accordingly, the substantial questions of law formulated in this second appeal are answered.

19. In the light of the above discussions, as above stated, the discussion of the merits of the case in this second appeal may not be proper and accordingly, in the light of the answers given to the substantial questions of law, I deem it fit and necessary to set-aside the judgment and decree of the first appellate Court in toto and accordingly, remit the matter back to the first appellate Court with a direction to the first appellate Court to take further proceedings pursuant to the orders passed by it in I.A. No.3/2000, as regards the reception of the additional evidence produced by the plaintiffs along with the said petition and accordingly, dispose of the first appeal on merits, after providing an opportunity to both the parties to make further submissions, with reference to their respective

cases and the first appellate Court is also directed to dispose of the first appeal as expeditiously as possible. Accordingly, the second appeal is disposed of. There is no order as to costs. Consequently, connected miscellaneous petition, if any is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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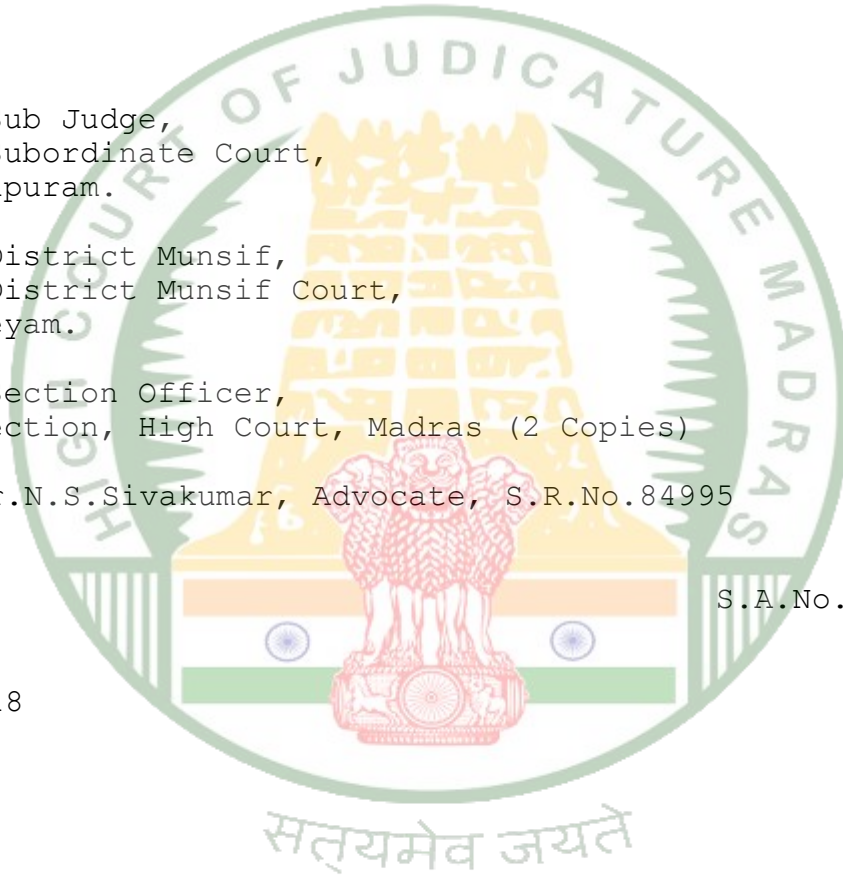
To

1. The Sub Judge,
The Subordinate Court,
Dharapuram.
2. The District Munsif,
The District Munsif Court,
Kangayam.
3. The Section Officer,
VR Section, High Court, Madras (2 Copies)

+1cc to Mr.N.S.Sivakumar, Advocate, S.R.No.84995

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VGI (CO)
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