

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.09.2017

CORAM

THE HONOURABLE MR.JUSTICE **R.SUBRAMANIAN**

C.M.A.Nos.1796/2016 & 1269/2017

and

C.M.P.No.13316/2016

1.Mrs.Sarojini

2.D.Velappan

..Appellants
in both Appeals

..Vs..

1.V.Raj

2.Sakunthala Ammal

3.Janab A.B.Abdul Rahim Rahib
Hereditary Mutavalli of Poorani Lubhai Mosque
No.66, Jeelani Sahib Street,
Alandur, Chennai-600 016.

4.The Chairman,
Tamilnadu Wakf Board,
Santhome High Road,Chennai-600 004.

5.The Sub-Registrar,
Saidapet, Chennai-15.

6.P.Ravi

7.R.Jayanthi

8.The Oriental Benefit & Deposits Society Limited,
No.31/2, Ranganathan Street,
T.Nagar, Chennai-600 017.

9.M/s.Balaji & Co.,
No.103, Nyniappan Naicken Stgreet,
Chennai-600 003.

..Respondents
in both Appeals

Prayer in C.M.A.No.1796/2016: Civil Miscellaneous Appeal filed under Order 43 Rule 1(t) of the Code of Civil Procedure, 1908, to set aside the order and decretal order dated 15.02.2016 made in C.M.P.No.58/2012 in A.S.No.719/2005 on the file of the XVI Additional City Civil Court at Chennai.

Prayer in C.M.A.No.1269/2017: Civil Miscellaneous Appeal filed under Order 43 Rule 1(t) of the Code of Civil Procedure, 1908, to set aside the order and decretal order dated 15.02.2016 made in C.M.P.No.57/2012 in C.M.P.No.20/2008 in A.S.No.719/2005 on the file of the XVI Additional City Civil Court at Chennai.

For Appellants : Mr.P.Kamarasu
(in both appeals)
For R-1 : Mr.R.Thiagarajan
(in both appeals)

COMMON JUDGEMENT

These appeals are directed against the common order dated 15.02.2016 passed by the learned XVI Additional City Civil Court, Chennai.

2 As against the order dated 15.02.2016 dismissing the CMP No. 58 of 2012 in A.S. No. 719 of 2005, which was filed for setting aside the exparte Judgment and decree dated 17.04.2009 passed in A.S. No. 719 of 2015, CMA No. 1796 of 2016 has been filed.

3 CMA No. 1269 of 2017 has been filed as against the order of dismissal dated 15.02.2016 made in CMP No. 57 of 2012, which was filed for setting aside the exparte order dated 17.04.2009 passed in CMP No. 20 of 2008 in A.S. No. 719 of 2005.

4 These appeals arises out of the suit in O.S.No.2855/1991, which was filed by the respondent herein seeking cancellation of the sale deed dated 26.03.1991 and for a mandatory injunction directing the 2nd respondent to recognize the plaintiffs as tenants in respect of the lands and for other reliefs. By a judgement and decree dated 24.12.2003, the said suit in O.S.No.2855/1991 was dismissed. As against the same, the respondent herein filed an appeal in A.S.No.719/2005. Pending appeal, the respondent filed an application in C.M.P.No.20/2008 seeking for reception of additional documents.

5 Admittedly, the respondents did not appear in the appeal. Since, they could not be served through counsel or privately, substituted service was ordered and on publication, they were treated as served in the appeal and consequently, the appeal came to be allowed exparte. Contending that they were not served notice in the appeal, the appellants filed CMP Nos.57 & 58/2015 specifically alleging that they were not served notice in the appeal and the service was only effected

through substituted service. Further, they came to know about the ex parte decree passed in the appeal only when they received notice in the execution proceedings.

6 The learned Additional Judge, City Civil Court, had dismissed the application on the ground that the appellants have not proved that they were not served with notice in the appeal and only on 18.09.2012, they came to know about the disposal of the appeal when they were served notice in the execution proceedings. The learned Additional Judge found fault with the appellants for not having filed the said notice received by them in the execution proceedings. Further, the learned Additional City Civil Judge was of the opinion that since the appeal had been allowed on merits, it is for the appellants to file a Second Appeal and not to seek for setting aside the judgement and decree treating it as an ex-parte order.

7 I have heard Mr.P.Kamarasu, learned counsel appearing for the appellants and Mr.R.Thiagarajan, learned counsel appearing for the first respondent.

8 The fact that the appellants herein were served notice only through substituted service in the appeal is not in dispute. Therefore, their non appearance in the appeal cannot be termed as willful. The learned trial Judge held that since the judgement has been delivered on merits, it is for the appellants to challenge

the same by way of Second Appeal and the petition seeking rehearing of the appeal cannot be maintained.

9 Order 41 Rule 21 of the Code of Civil Procedure entitles the respondent to seek to re-hear the appeal which was allowed ex parte, whether the judgement is on merits or otherwise. Merely because the respondent in the appeal was absent, an appeal cannot be automatically allowed. The Appellate Court is expected to go into findings of the trial Court and decide whether the appeal could be allowed or not. Even if the respondent is absent that alone cannot be a ground to allow the appeal setting aside the judgement of the trial Court without analysing the findings of the trial Court and the evidence on record. Therefore, the reasons assigned by the learned Appellate Judge that the applications are not maintainable and it is for the appellant to have filed a Second Appeal challenging the judgement cannot be sustained. Hence, both the appeals are allowed. The judgement and decree dated 17.04.2009 passed in C.M.P. No. 58 of 2012 in A.S. No. 719/2005 and C.M.P. No. 57 of 2012 in C.M.P.No.20/2008 in A.S.No.719/2005 are set aside. The Civil Miscellaneous Petition in CMP No.20/2008 and the appeal in A.S.No.719/2005 on the file of the XVI Additional City Civil Court, Chennai are ordered to be restored. The learned Appellate Judge vz., The XVI Additional City Civil Judge is directed to dispose of the appeals as wells as the Civil Miscellaneous Petition within a period of three months from the date of receipt of a copy of this judgment. No costs.

Consequently, the connected miscellaneous petition is closed.

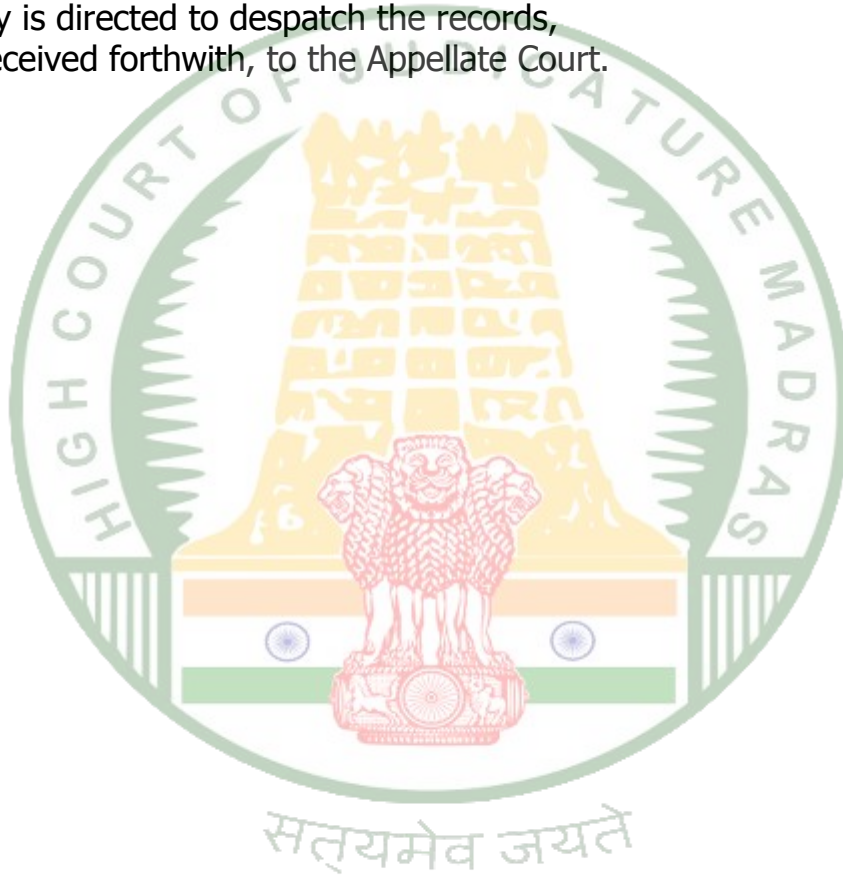
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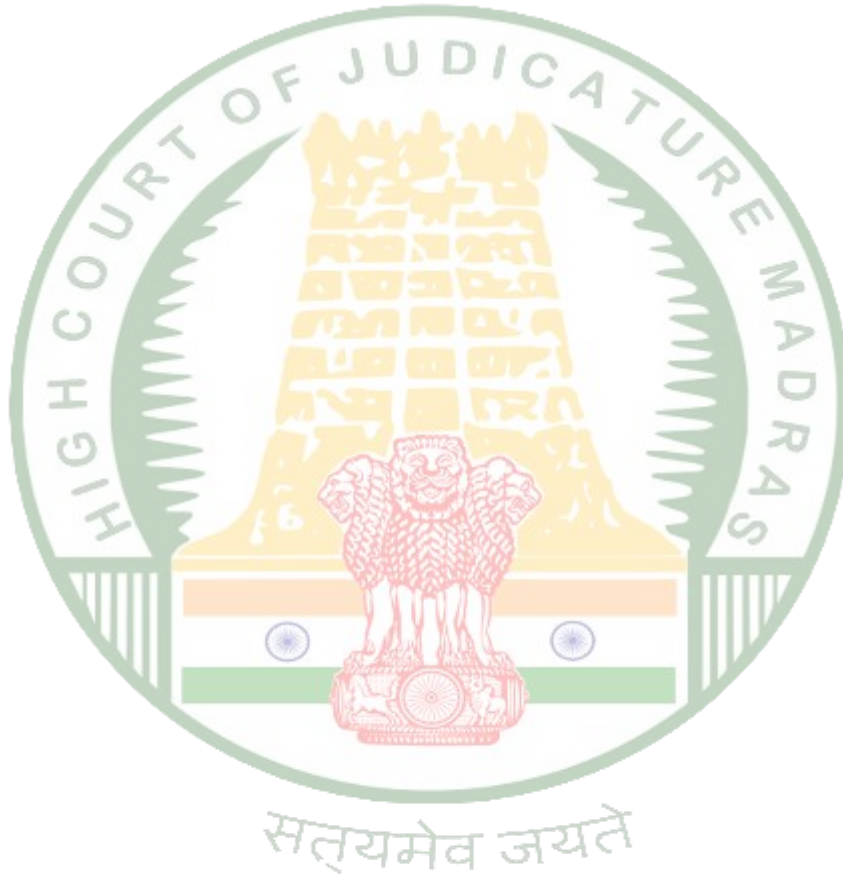
Note : Registry is directed to despatch the records,
if any received forthwith, to the Appellate Court.

KP



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- 1.The Chairman,
Tamilnadu Wakf Board,
Santhome High Road, Chennai-600 004.
- 2.The Sub-Registrar,
Saidapet, Chennai-15.
- 3.The Section Officer,
V.R.Section, High Court, Madras.



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R.SUBRAMANIAN., J.

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08.09.2017

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