



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.02.2017

CORAM:

THE HONOURABLE MR. JUSTICE M. DURAISWAMY

S.A. (MD) No. 524 of 2016

and

C.M.P. (MD) No. 6315 of 2016

WEB COPY

1. Karuppiyah Ambalam

2. Kailasam

.. Appellants/Respondents 1&2/
Plaintiffs

-vs-

1. Rukmani

2. Peramiah

.. Respondents 1 & 2/Appellants 1&2/
Defendants 2&3

3. State of Tamil Nadu,
represented by its
District Collector,
Pudukkottai.

.. 3rd Respondent/3rd Respondent/
1st Defendant

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 30.11.2015 made in A.S.No.37 of 2008, on the file of the learned Subordinate Court, Pudukkottai by reversing the judgment and decree made in O.S.No.185 of 1997, dated 20.02.2007, on the file of the learned District Munsif, Aranthangi.

For Appellants : Mr. K. Subramanian

For Respondents : Mr. Niranjan S. Kumar

JUDGMENT

The above Second Appeal arises against the judgment and decree passed in A.S.No.37 of 2008, on the file of the Subordinate Court, Pudukkottai, reversing the judgment and decree passed in O.S.No.185 of 1997, on the file of the District Munsif Court, Aranthangi.

2. The appellants are the plaintiffs and the respondents were the defendants in the suit. The plaintiffs filed the suit in O.S.No.185 of 1997 to declare that the suit property is part of the tank "Vattakulam" in survey No.204/1 for irrigation source and consequently restrain the defendants 2 and 3 from cultivating the suit property or to put it for any other purpose so as to infringe the plaintiffs' right to use the irrigation source. The defendants filed their written statement and contested the suit.

3. Before the trial Court, on the side of the plaintiffs P.W.1 was examined and 15 documents viz., Exs.A.1 to A.15 were marked and on the side of the defendants, two witnesses were examined and 6 documents viz., Exs.B.1 to B.6 were marked and the Advocate



Commissioner's report and plan were marked as Exs.C.1 and C.2. After taking into consideration the oral and documentary evidences let in by the parties, the trial Court decreed the suit. Aggrieved over the judgment and decree of the trial Court, the defendants 2 and 3 preferred an appeal in A.S.No.37 of 2008, on the file of the Subordinate Court, Pudukkottai and the lower Appellate Court reversed the judgment and decree of the trial Court and allowed the appeal. Aggrieved over the judgment and decree of the lower Appellate Court, the plaintiffs filed the Second Appeal in S.A.(MD)No.119 of 2010.

4. Since the lower Appellate Court reversed the judgment and decree of the trial Court without assigning any reason, this Court by its judgment dated 08.10.2015 set aside the judgment and decree of the lower Appellate Court and remanded the matter for fresh consideration. In the said appeal the appellants also filed a petition in M.P.(MD)No.1 of 2012 under Order 41 Rule 27 of the Civil Procedure Code to permit them to produce additional document, viz., the file relating to the statutory statement proceedings conducted by the Settlement Authorities under Tamil Nadu Estates Abolition (and Conversion into Ryotwari) Act - Act 26/1946 relating to Survey No.204/1 and 213/1 in R.P.No.1/26/46/Aranthangi/91-pages 1 to 103. This Court allowed the petition in M.P.(MD)No.1 of 2012 and marked the additional document as Ex.A.16, since the defendants did not have any objection for receiving the said document as additional document. Since the respondents 1 and 2 did not have any objection for receiving the said document as additional document, this Court observed that there is no necessity for adducing any oral evidence before the lower Appellate Court with regard to the proof of the said document.

5. This Court by its judgment dated 08.10.2015 set aside the judgment and decree passed in A.S.No.37 of 2008 and remanded the matter back to the Subordinate Court, Pudukkottai for fresh consideration. Further the lower Appellate Court was directed to decide the matter afresh after taking into consideration the available oral and documentary evidence let in by both parties and decide the appeal afresh on merits and in accordance with law without being influenced by any of the observation given in the said Second Appeal. Now, after remand, the lower Appellate Court decided the matter afresh, after taking into consideration the available oral and documentary evidences let in by the parties and set aside the judgment and decree passed in O.S.No.185 of 1997 and allowed the appeal. Aggrieved over the judgment and decree of the lower Appellate Court, the plaintiffs have filed the above Second Appeal.

<https://hcservices.courts.gov.in/hcservices> 6. ~~Hein/hcs~~ Mr.K.Subramanian, learned Counsel appearing for the appellants and Mr.Niranjana S.Kumar learned Counsel appearing for the respondents.



7. At the time of admission of the above Second Appeal, the following Substantial Questions of Law arose for consideration:

"1. Whether the lower Appellate Court is right in accepting Ex.A.16 the settlement enquiry proceedings without considering the mystery of missing pages?

2. Whether the grant of patta for the suit property classified as tank and irrigation source is sustainable in view of the vesting contemplated under Sec.3(b) and the prohibition of grant of patta under Sec.14A of the Estates Abolition Act (Act26/1948)?

3. Whether the lower Appellate Court's observations and finding are contrary to the settled principles of law and position of law laid down in the various findings of the Hon'ble High Court as well as Hon'ble Apex Court regarding the grant of patta in respect of Tanks (whether private or irrigation source), tank bunds, Ooranies?

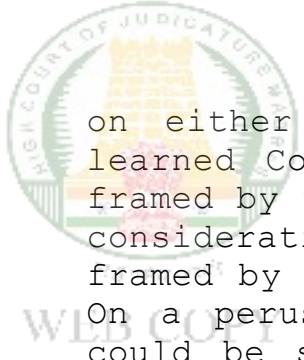
4. Whether the failure of the lower Appellate Court to consider the pleadings the evidence, both oral and documentary on both sides with reference to the position of law without points for consideration has rendered its judgment incorrect and sustainable as mandated under Order 41 Rule 31 C.P.C.?"

8. The only point argued by Mr.K.Subramanian, learned Counsel appearing for the appellants is that the lower Appellate Court having formulated the issues for consideration, should have referred the matter to the trial Court for getting a finding with regard to the said issues. The learned Counsel submitted that the issues formulated by the lower Appellate Court cannot be construed as points for consideration under Order 41 Rule 31 C.P.C. and it should be construed only as additional issues framed by the lower Appellate Court under Order 41 Rule 25 C.P.C. In these circumstances, the learned Counsel submitted that the judgment and decree of the lower Appellate Court is liable to be set aside and remanded to the trial Court for fresh consideration.

9. Countering the submissions made by the learned Counsel appearing for the appellants, Mr.Niranjan S.Kumar, learned Counsel appearing for the respondents submitted that the issues framed by the lower Appellate Court should be construed only as points for consideration in the first appeal under Order 41 Rule 31 C.P.C. and it cannot be construed as additional issues framed by the lower Appellate Court. Further the learned Counsel submitted that the plaintiffs have miserably failed to establish their case by adducing proper evidence before the trial Court. Hence, the learned Counsel submitted that the lower Appellate Court has rightly reversed the judgment and decree of the trial Court and dismissed the suit.

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10. On a careful consideration of the materials available on record and the submissions made by the learned Counsel appearing



on either side, since the only point that was argued by the learned Counsel appearing for the appellants is that the issues framed by the lower Appellate Court can be construed as points for consideration under Order 41 Rule 31 C.P.C. or additional issues framed by the lower Appellate Court under Order 41 Rule 25 C.P.C. On a perusal of the judgment of the lower Appellate Court, it could be seen that the appellants and the respondents submitted their draft issues before the lower Appellate Court for consideration. After considering the draft issues, the lower Appellate Court took four issues for consideration and decided the appeal on those four issues.

11. As per the provisions of Order 41 Rule 25 C.P.C., when the trial Court has omitted to frame or try any issue or determine any question of fact which appears to the lower Appellate Court essential to the right decision of the suit upon the merits, the lower Appellate Court may, if necessary, frame issues and refer the same for trial to the trial Court and in such a case, shall direct such Court to take the additional evidence required and thereafter, the trial Court shall proceed to try such issues and shall return the evidence to the appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the appellate Court or extended by it from time to time. In order to bring in application of Order 41 Rule 25 C.P.C., the appellate Court must come to the conclusion that the trial Court has omitted to frame issues or failed to determine any question of fact which in the opinion of the appellate Court are essential for the right decision of the suit on merits. Once the appellate Court comes to such conclusion, it may, if necessary, frame issues and refer the same to the trial Court.

12. In the case on hand, the lower Appellate Court has not come to the conclusion that the trial Court had omitted to frame issues or failed to determine any question of fact, which in its opinion are essential for the right decision of the suit on merits. When the lower Appellate Court has not given any finding to that effect, there is no necessity for the lower Appellate Court to refer the matter to the trial Court to take additional evidence. In the absence of any specific finding recorded by the lower Appellate Court with regard to the framing of issues by the trial Court, the provisions of Order 41 Rule 25 C.P.C. are not applicable. Further in the case on hand, when the matter was remanded back to the lower Appellate Court vide judgment dated 08.10.2015 made in S.A.(MD)No.119 of 2010, it was specifically observed that the lower Appellate Court should decide the matter afresh after taking into consideration the available oral and documentary evidences let in by both the parties. This Court also observed in paragraph No.16 that there is no necessity for additional evidence before the lower Appellate Court with regard to the proof of additional document marked as Ex.A.16. In these circumstances, the contention of the learned Counsel



appearing for the appellants that the lower appellate Court in paragraph No.9 has only framed the issues and not the points for consideration cannot be accepted.

13. It is pertinent to note that the lower Appellate Court has not framed any points for consideration in the appeal separately. Therefore, the four issues mentioned in paragraph No.9 of the judgment of the lower Appellate Court should be construed only as points for consideration under Order 41 Rule 31 C.P.C.

14. Even on merits, the lower Appellate Court has considered the oral and documentary evidences and rightly came to the conclusion that the plaintiffs have not established their case by adducing proper evidence. The lower Appellate Court has rightly decided the appeal after taking into consideration the available oral and documentary evidences let in by the parties. Since the learned Counsel appearing for the appellants has not advanced any other argument other than the submission stated above, I am not giving any finding with regard to other questions of law. I do not find any error or irregularity in the judgment and decree of the lower Appellate Court.

15. In these circumstances, I do not find any ground much less any substantial question of law to interfere with the judgment and decree of the lower Appellate Court. The Second Appeal is liable to be dismissed. Accordingly, the same is dismissed. There shall be no order as to costs. Consequently, the connected Miscellaneous Petition is also dismissed.

Sd/-

Assistant Registrar(CO)

/TRUE COPY/

Sub Assistant Registrar

To

1. The Subordinate Judge, Pudukottai.
2. The District Munsif, Aranthangi.

+1 cc to MR.Niranjan S.Kumar, ADVOCATE, SR NO:10649

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