IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.07.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.332 of 2018
and C.M.P.Nos.9337, 10168 and 12119 of 2018

Francoise Armandle
@ Francoise Annietosette
.. Appellant/1st Respondent/1st Defendant

Vs.

1.Ramu ..1st Respondents/Appellant/Plaintiff

2.M/S.Kalki Kuechlin
.. 2nd Respondent/2nd Respondent/2nd Defendant

Second Appeal filed under Section 100 of C.P.C against the judgment and decree dated 20.03.2018 made in A.S.No.36 of 2016 on the file of the Additional Subordinate Court, Tindivanam, reversing the judgment and decree dated 18.04.2016 made in O.S.No.3 of 2012 on the file of the District Munsif Court, Vanur.

For Appellant : Mrs.Hema Sampath, Senior Counsel
for Mr.M.Vaikunth

For R1 : Mr.R.Sreedhar

For R2 : Mr.B.Balavijayan

JUDGMENT

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The Second Appeal is filed against the judgment and decree dated 20.03.2018 made in A.S.No.36 of 2016 on the file of the Additional Subordinate Court, Tindivanam, reversing the judgment and decree dated 18.04.2016 made in O.S.No.3 of 2012 on the file of the District Munsif Court, Vanur.

2.The appellant is first defendant, first respondent is plaintiff and second respondent is second defendant in O.S.No.3 of 2012 on the file of the District Munsif Court, Vanur. The first respondent filed said suit for declaration that the suit

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property belongs to him and for permanent injunction restraining the appellant and second respondent from interfering with his peaceful possession and enjoyment of the suit property. According to the first respondent, his father Kuppan was cultivating tenant under one Mohammed Beevi some 40 years of back on the date of filing of the suit. Mohammed Beevi died 30 years before and first respondent's father Kuppan was cultivating tenant under one Mohammed Atali 20 years earlier to filing of the suit. First respondent's father originally purchased the suit property from Mohammed Atali, son of Mohammed Beevi for a sum of Rs.15,000/- and from the date of purchase, father of the first respondent was in possession and enjoyment of the suit property. The said Kuppan had planted coconut saplings and now there are 350 coconut trees in the suit property. To prove the title of the first respondent's father, first respondent filed chitta, adangal and FMB sketch. The first respondent's father by the Will dated 29.07.2002 bequeathed the suit property to the first respondent. After the death of his father, first respondent became the absolute owner of the suit property and he is in possession and enjoyment of the same. The appellant and second respondent on 05.12.2011 tried to interfere with the possession of the first respondent and hence he has filed the suit for the above stated reliefs.

3.The appellant filed written statement and it was adopted by the second respondent. The appellant and second respondent denied title of the first respondent and contended that they are the owners of the suit property by purchase from the original owner. Along with the written statement, they filed 15 documents to substantiate their contentions in the written statement.

4. Based on the above pleadings, the learned trial Judge framed necessary issues. Before the learned trial Judge, first respondent examined himself as P.W.1 and three other witnesses as P.W.2 to P.W.4 and marked 16 documents as Exs.A1 to A16. After filing of the written statement, the appellant and second respondent did not appear and cross-examine the witnesses of the first respondent. The appellant and second respondent were set exparte.

5.The learned trial Judge considering the pleadings, oral and documentary evidence let in by the first respondent, dismissed the suit.

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6.Against the said judgment and decree dated 18.04.2016 made in O.S.No.3 of 2012, the first respondent filed A.S.No.36 of 2016 on the file of the Additional Sub Court, Tindivanam.

7.The learned First Appellate Judge framed necessary points for consideration. The learned First Appellate Judge independently considering the materials on record, judgment of

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the trial Court and arguments of the counsel for the parties, allowed the First Appeal.

8.Against the said judgment and decree dated 20.03.2018 made in A.S.No.36 of 2016, reversing the judgment and decree dated 18.04.2016 made in O.S.No.3 of 2012, the present Second Appeal is filed by the appellant/first defendant.

9.At the time of admission of the Second Appeal, the following substantial questions of law were framed and interim injunction was granted:

"(a) Whether finding of the lower appellate Court is correct in holding that the oral sale executed in favour of the plaintiff's father Kuppan is valid, when Section 54 of the Transfer of Property Act, 1882 and Section 17 of the Registration Act, 1908 mandates any conveyance much less sale of immovable property values Rupees 100 and above should compulsorily be registered?

(b) Whether mutation of patta will confer any title on the person who claims to be owner of the property when disputed?"

10.First respondent filed petition for vacate stay and when the vacate stay petition was listed along with Second Appeal, the learned Senior Counsel for the appellant as well as the learned counsel for the respondents 1 and 2, submitted that the Second Appeal may be heard and disposed of. In view of the same, Second Appeal is taken up for final hearing by consent.

11.The learned Senior Counsel for the appellant submitted that the appellant engaged one Ms.V.Kamala Kumar on behalf of the appellant and second respondent and filed written statement along with the documents relied on by them. The said Ms.V.Kamala Kumar did not appear at the time of trial and appellant & second respondent were set exparte. Ms.V.Kamala Kumar, did not inform the appellant and second respondent about the same, but informed them that they succeeded in the suit. In the First Appeal, appellant engaged the same counsel. From the judgment of the First Appellate Court, it is seen that Ms.V.Kamala Kumar engaged by the appellant did not appear and argue the case on behalf of the appellant. It is seen that one Mr.V.Kandhakumar appeared for the appellant. According to the learned Senior Counsel for the appellant, appellant did not engage the said counsel. Only when the judgment in the First Appellate Court was received by the appellant, she came to know about the non-appearance of Ms.V.Kamala Kumar. Both the Courts below did not consider the documents filed along with written statement by the appellant and second respondent to substantiate their case. It is the duty of the First Appellate Court to consider all the materials and

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give findings of the same. A party should not suffer by mistake of counsel engaged by him and an opportunity must be given to the parties to lead evidence or additional evidence. To substantiate her contentions, the learned Senior Counsel for the appellant relied on the following judgments:

(i) (1981) 2 SCC 788 (Rafiq and another vs. Munshilal and another);

(ii) (2018) 4 SCC 659 (Akhilesh singh v. Lal babu singh and others);

11(i) In addition to above submission, the learned Senior Counsel for the appellant made submissions on merits and referred extensively to the judgment of the First Appellate Court as well as the documents relied on by the first respondent. According to the learned Senior Counsel, there are discrepancies between the pleadings, documents and evidence let in by the first respondent. Without properly appreciating these facts, the First Appellate Court erroneously allowed the First Appeal filed by the first respondent. After such submission, the learned Senior Counsel contended that either this Court mark documents filed by the appellant along with written statement in the Second Appeal and decide the Second Appeal on merits or remand the suit to the trial Court for fresh disposal.

12.The learned counsel for the first respondent contended that only Ms.V.Kamala Kumar entered appearance before the First Appellate Court in the First Appeal and argued the matter on behalf of the appellant. The appellant did not take any steps for marking documents in the First Appeal and as they have failed to do so, they are not entitled to seek marking of the documents filed along with the written statement in the suit or they are not entitled to seek remand for fresh trial. The learned counsel for the first respondent has also made submissions on merits and contended that the First Appellate Court has appreciated all the materials on record in proper perspective, allowed the First Appeal and prayed for dismissal of the Second Appeal. The learned counsel for the first respondent in support of his contentions, relied on the following judgments:

(i) 2016 (3) MWN (Civvil) 606 (N.Sengottaiyan and another v. Shanmughavadivu and another);

(ii) C.M.No.18654 of 2017 dated 18.05.2017 RFA.No.497 of 2017 (Moddus Media Pvt. Ltd. v. M/S.Scone Exhibition Pvt. Ltd.);

(iii)(2016) 10 SCC 315 (Syeda Rahimunnisa v. Malan Bi (dead) by legal representatives and another);

> "The High Court had no jurisdiction to remand the case to the trial Court inasmuch as no party to the appeal had even raised this ground before the first appellate Court or/and the High Court as to why the remand of the case to the trial Court is called for nor was there any finding

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recorded on this question by the first appellate Court."

(iv) 2014 (3) MWN (Civil) 125 (Guruvammal and another v. Chinnamuniyandi and another);
(v) (2003) 4 SCC 161 (Bondar singh and others v. Nihal singh and others);
(vi) (2015) 17 SCC 713 (A.Andisamy Chettiar v. A.Subburaj Chettiar);
(vii) (2012) 6 CTC 303 (Kesavan and others v. Muthu);

13.Heard the learned Senior Counsel for the appellant as well as the learned counsel for the respondents 1 and 2 and perused the materials available on record.

14.From the materials available on record, it is seen that the appellant and second respondent have filed written statement. The appellant has filed certified copies of the documents filed by them along with the written statement, which was issued by the trial Court in the typed set of papers filed in the Second Appeal. It is not in dispute that the counsel appearing for the appellant did not appear at the time of trial and did not cross-examine the witnesses of the first respondent. The appellant and second respondent were not examined before the trial Court and documents filed by them along with written statement were not marked. In the First Appeal, according to the appellant, the advocate engaged by them did not appear and some other advocate's name has been mentioned in the First Appeal, without any instruction from them. On the other hand, learned counsel for the first respondent submitted that only Ms.V.Kamala Kumar, advocate appeared on behalf of the appellant before the First Appellate Court.

15. I have perused the judgment of the First Appellate Court, wherein it has been stated that one Mr.V.Kandhakumar appeared for the appellant and second respondent. From the materials on record, it is seen that even though appellant and second respondent have handed over the documents relied on by them to the advocate and filed written statement along with document, advocate engaged by appellant did not appear before during trial and did not mark those documents.

16.The contention of the learned Senior Counsel for the appellant that the appellant and second respondent were not informed about the non-marking of the documents and they were simply informed that they have succeeded in the suit and therefore appellant must be given an opportunity to put forth their case on merits after marking the documents filed along with written statement relied on by the appellant, has considerable force. As per the judgment of the Hon'ble Apex Court relied on by the learned Senior Counsel for the appellant

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reported in (1981) 2 SCC 788 (Rafiq and another vs. Munshilal and another), a party should not suffer for the mistake of his counsel.

17.Considering the above facts along with the decisions relied on by the learned Senior Counsel for the appellant, without deciding the issue on merits, it will be in the interest of justice, the suit in O.S.No.3 of 2012 is remanded to the trial Court for fresh consideration for fresh disposal. The learned trial Judge is directed to dispose of O.S.No.3 of 2012 within a period of three months from the date of receipt of a copy of this order, without being influenced by the earlier judgment of the trial Court as well as judgment of the First Appellate Court. The Registry is directed to send all the records immediately along with this judgment to the trial Court.

18.In the result, the Second Appeal is allowed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS-IV)

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Sub Assistant Registrar

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To

1.The Additional Subordinate Judge,
Tindivanam, Civil Judge, (Senior Division)

2. The District Munsif cum Judicial Magistrate,
Vanur.

3. The Section Officer,
VR Section, High Court,
Madras.

+1cc to Mr.B.Balavijayan, Advocate, S.R.No. 49225
+2cc to Mr.R.Sreedhar, Advocate, S.R.No. 49132
+1cc to Mr.M.Vaikunth, Advocate SR.No. 49226

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GN(04/09/2018)

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