

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 21.12.2017

PRONOUNCED ON:18.01.2018

CORAM

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

S.A.NO.1874 OF 2000

AND

C.M.P.NO.17837 OF 2000

Arumuga Achari ... Appellant/Respondent/Defendant

Vs.

Ramasamy Achari ... Respondent/Appellant/Plaintiff

Prayer:- Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and Decree 24.09.1999 made in A.S.No.36 of 1997 on the file of the learned Subordinate Judge, Kallakurichi, reversing the Judgment and Decree, dated 31.01.1997 made in O.S.No.444 of 1994 on the file of the learned II Additional District Munsif, Kallakurichi.

For Appellant : Mr.C.Ramesh

For Respondent : No appearance

JUDGMENT

This Second Appeal has been filed by the defendant against the Judgment and Decree passed by the learned Subordinate Judge, Kallakurichi in A.S.No.36 of 1997, dated 24.09.1999.

2. The respondent herein has filed a suit in O.S.No.444 of 1994 on the file of the II Additional District Munsif, Kallakurichi for declaration and recovery of possession. Though the suit was dismissed by the trial Court, on appeal by the plaintiff, it was decreed by allowing the appeal. Hence, the defendant has filed this Second Appeal. For the sake of convenience, the parties are referred to as prescribed before the trial Court.

3.The averments made in the plaint are in brief as follows:

One Manikka Asari was the original owner of the suit property. He executed a registered Will, dated 19.02.1991 in favour of the plaintiff and subsequently he died. Thereafter, the plaintiff acquired the suit property and enjoyed the same by paying house tax. But, on 29.04.1994, the defendant trespassed into the suit property and tried to build a thatched house. Hence, the plaintiff has filed the suit for declaration and recovery of possession.

4.The averments made in the Written Statement are in brief as follows:

The averments that the said Manikka Asari was the original owner of the suit property and he had executed a Will in favour of the plaintiff and after the death of the said Manikka Asari, the plaintiff acquired the suit property and thereafter the defendant trespassed into the suit property are all false. The suit property belongs to the defendant, who had always been in possession and enjoyment thereof. The plaintiff had issued a notice prior to the suit to which the defendant has sent a reply on 22.04.1994. Suppressing the said fact, the plaintiff has filed the above suit. By the open, peaceful and continuous possession, the defendant has perfected title by adverse possession also. Therefore, the defendant had prayed to dismiss the suit.

5.Based on the aforesaid pleadings, the learned District Munsif has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as P.W.1 and also examined one Murugesan as P.W.2. He has marked Ex.P.1 to P.5 as exhibits. On the side of the defendant, the defendant examined himself as D.W.1 and marked one document as Ex.B1.

6.The learned District Munsif, after considering the materials placed before her, found that the plaintiff has failed to establish that the said Manikka Asari got title over the suit property and accordingly, she dismissed the suit. Aggrieved by the same, the plaintiff has preferred First Appeal. The learned First Appellate Judge, has set aside the Judgment and Decree of the trial Court and decreed the suit as prayed for. As against the said Judgment and decree, the defendant has filed the present Second Appeal.

7. At the time of admitting the Second Appeal, the following substantial questions of law were formulated.

(i).Whether the lower appellate Court erred in defining the provision under Order XL Rule 27 of the Civil Procedure Code in having

received Ex.A6 and Ex.A7, which were not at all tendered in the trial Court?

(ii)Whether the lower appellate Court was not correct in fixing the burden of proof upon the defendant in order to prove his case of title in respect of the suit property when it is, in law, expected to clothe the burden upon the plaintiff?.

8.Initially, M/s.G.Ranganathan and R.Thangadurai, Advocates have filed Vakalath for the respondent, but subsequently, when the case was posted for arguments, nobody appeared for the respondent and hence respondent was set exparte. After hearing the arguments of the counsel for the appellant, Judgment is being passed.

9.The learned counsel for the appellant contended that the plaintiff has claimed title through the Will(Ex.A1) said to have been executed by one Manikka Asari. He further contended that in the written statement, the defendant has categorically denied the title of the said Manikka Asari over the suit property, but the plaintiff did not produce any documentary evidence to show that the said Manikka Asari got title over the suit property before the trial Court. On the contrary, he has filed two sale deeds which are stand in the name of the wife of the said Manikka Asari by filing an application under Order 41 Rule 27 C.P.C. He further submitted that even though the defendant has resisted the said application by filing counter, the first Appellate Court has allowed the said application and thereafter without following the procedure contemplated under order 41 rule 28 C.P.C., the First Appellate Judge has straight away marked the said sale deeds as Ex.A6 and Ex.A7. He further submitted that the procedure adopted by the First Appellate Court is against the well settled position of law .

10.In support of the aforesaid contentions, the learned Counsel for the Appellant/Defendant has relied upon the decision in T.Tamilarasan Vs.Arokkiasamy and 2 others, 2007-2-L.W.999, wherein, this Court has held as follows:

"12.Order 41 Rule 27 and 28 C.P.C. Contemplates the procedure to be followed for production of additional evidence in the appellate Court. The said provision stated as follows:

27.Production of additional evidence in Appellate Court (1)The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or)

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgement, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

(28) Mode of taking additional evidence:-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"

13. Therefore it is clear that when in the appellate Court it is established that notwithstanding due diligence such evidence could not be produced during the trial stage or in cases where the appellate Court requests the document to be produced for pronouncing judgement or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced or witness to be examined. It is also made clear that in cases where the appellate Court takes a decision to allow the additional evidence, it is to direct the Court from whose decree the appeal is preferred, or any other Subordinate Court, to take such evidence and to send it to the Appellate Court for decision. Therefore, there are two steps when additional evidence is filed before the appellate Court, namely;

1) When the appellate Court is satisfied when such additional evidence is required to be produced the appellate Court shall pass an order with giving reasons.

2) Thereafter, either the appellate Court itself can take evidence or direct the subordinate Court to take

evidence for proving the additional documents and sent the report so as to give a final decision in the present case.

14.A reading of the Judgment of the first appellate Court shows that the first appellate Court has straight away taken the additional documents filed on behalf of the defendants in the suit who were appellants before the first appellate Court without even giving any opportunity to the plaintiff to disprove the veracity or otherwise of such documents by way of evidence and the first appellate Court has considered as if those documents were proved and chosen to pass final judgment which is a patent error committed by the first appellate Court in not following the code of Civil Procedure Code scrupulously. It is relevant to point out at this stage that the plaintiff has been given opportunity to file counter affidavit in the application for receipt of the additional evidence. It is one thing to say that the first appellate Court has allowed the documents to be produced and another thing to prove the document through proper method of evidence. In the present case, the second aspect has not been followed by the first appellate Court.

15.In such circumstances, there is absolutely no difficulty to come to the conclusion that the reliance placed on those documents which are not proved before the Court below cannot be sustained".

11.After observing so, this Court has set aside the Judgment and decree of the First Appellate Court and remanded the matter back to the First Appellate Court with a direction to follow the provisions of Order 41 Rule 27 and 28 C.P.C.,

12.In this case also, after allowing the application to receive additional documentary evidence, the First Appellate Court has straight away marked the documents as Ex.A6 and A.7, without giving an opportunity to the defendant to cross examine with reference to the said documents. The First Appellate Court has allowed the First Appeal mainly relying on Ex.A6 and A.7. So, the aforesaid decision will squarely apply to the fact of this case. In view of the above said facts, the Judgment and decree of the First Appellate Court are set aside and the Second Appeal stands allowed and the matter is remanded back to the First Appellate Court with a direction to follow the procedure contemplated under Order 41 Rule 27 and 28 C.P.C., by giving opportunities to both the parties as stated above and dispose of the first appeal in accordance with law.

13. In the result, the second appeal stands allowed in the above terms. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CS VII)

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Sub Assistant Registrar

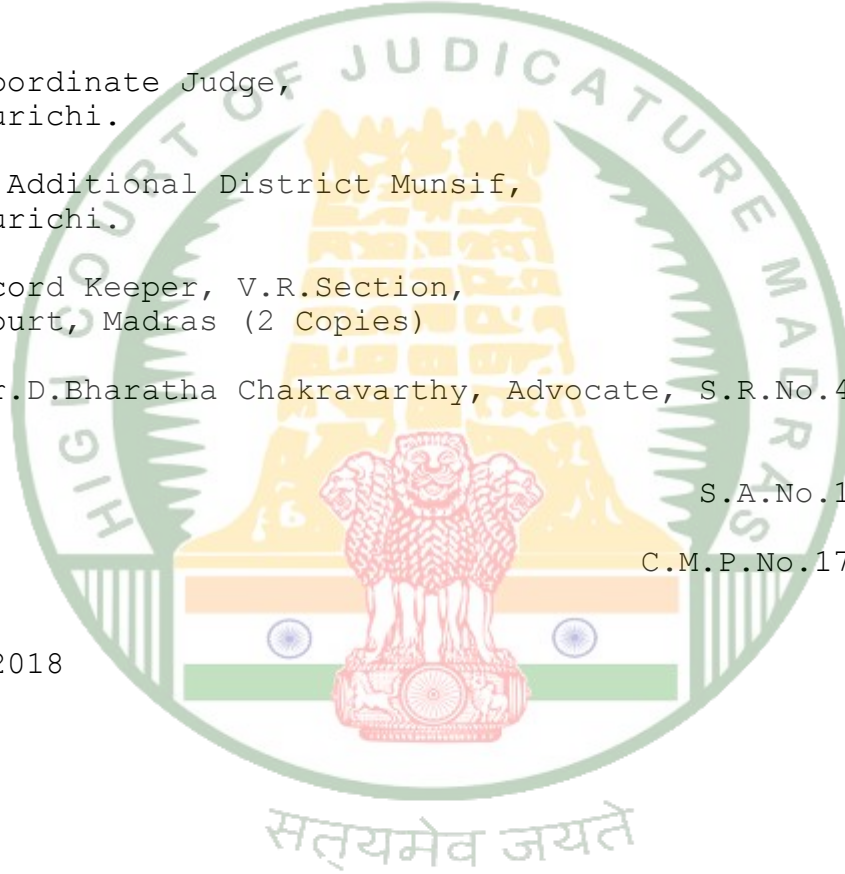
msa

1. The Subordinate Judge,
Kallakurichi.
2. The II Additional District Munsif,
Kallakurichi.
3. The Record Keeper, V.R.Section,
High Court, Madras (2 Copies)

+1cc to Mr.D.Bharatha Chakravarthy, Advocate, S.R.No.4056

S.A.No.1874 of 2000
and
C.M.P.No.17837 of 2000

VGII(CO)
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