

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.06.2018

PRONOUNCED ON : 10.07.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.1367 of 2004

1. Nagappan @ Sambandam
2. Marimuthu
3. Mangayarkarasi
4. Vedavalli
5. Radharukmini
6. Jayarani
7. Parvathi

..Appellants/ 2to7 LR's of the
first defendant

Vs.

Subbaiyan

..Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 27.06.2003, made in A.S.No.3 of 2000, on the file of the Sub Court at Tiruvarur, reversing the judgment and decree dated 29.01.98, made in O.S.No.301 of 1996, on the file of the District Munsif Court at Thiruthuraipoondi.

For Appellants : Mr.Srinath Sridevan

For Respondent : Mr.S.Senthilnathan

JUDGMENT

In this second appeal, challenge is made to the judgment and decree dated 27.06.2003, passed in A.S.No.3 of 2000, on the file of the Subordinate Court, Tiruvarur, reversing the judgment and decree dated 29.01.98, passed in O.S.No.301 of 1996, on the file of the District Munsif Court at Thiruthuraipoondi.

2. The second appeal has been admitted on the following substantial questions of law:

"1. Whether the evidence recorded by the appellate Court in the interlocutory proceedings in IA No.19 of 2000 can be referred to in the hearing of the appeal, without separately marking the same in the appeal?

2. Whether an application for reception of additional evidence should not be heard along with the appeal and if so whether the order passed in IA No.19/2000 is not illegal?"

3. Inasmuch as after hearing the counsel for the respective parties and on going through the materials placed on record, I deem it necessary to remit the matter back to the first appellate Court for hearing the appeal afresh as well as the other matters, I refrain from discussing the merits of the case one way or the other as the determination of the same in this appeal would not be in the interest of justice.

4. It is found that the respondent/plaintiff has laid the suit against the defendants for the relief of permanent injunction on various grounds. The abovesaid case of the respondent/plaintiff has been stiffly resisted by the defendants by filing a written statement and it is seen that in support of the plaintiff's case, PW1 has been examined and Exs.A1 and A2 have been marked and in support of the defendants case, DWs 1 to 4 were examined and Exs.B1 to B18 were marked.

5. The trial Court, on an appreciation of the materials abovestated and the submissions put forth by the parties concerned, ultimately dismissed the plaintiff's suit. Aggrieved over the same, it is found that the respondent/plaintiff has preferred the first appeal. It is noted that the defendants in the first appellate Court had preferred a petition in I.A.No.19 of 2000 under Order 41 Rule 27 of the Code of Civil Procedure for the reception of additional evidence in support of their case. It is found that the plaintiff was put on notice about the said petition and the plaintiff has filed his counter opposing the reception of the additional evidence projected by the defendants.

6. On seeing the manner and the procedure adopted by the first appellate Court in dealing with the abovesaid Interlocutory Application, it is found that a very strange and improper procedure had been adopted by the first appellate Court in determining the abovesaid application and on account of the same, I consider it necessary that the matter should be remitted back to the first appellate Court again for the re-hearing of the appeal afresh for the reasons stated infra.

7. As above noted, IA No. 19 of 2000 has been preferred by the defendants for the reception of additional evidence in support of their case before the first appellate Court. The same has been stoutly resisted by the plaintiff. Accordingly,

it is found that as per Order 41 Rule 27 of the Code of Civil Procedure, if the first appellate Court had felt that the defendants are entitled to let in the additional evidence projected by them on the ground that they had satisfied any one of the three requirements contemplated under the said provisions of law, it is found that the first appellate Court would be justified in entertaining the said petition and accordingly, it is found further, that if the first appellate Court deemed it further necessary that oral evidence has to be recorded with reference to the reception of the additional evidence, the same could also be adopted by the first appellate Court by taking recourse to the methods adumbrated under Rules 28 and 29 of Order 41. However, in so far as this case is concerned, it is found that the procedure adopted by the first appellate Court is found to be highly irresponsible and not in consonance with the provisions of Order 41 Rules 27 to 29.

8. On a perusal of the notes paper in IA No. 19 of 2000, it is found that after the plaintiff had filed counter opposing the reception of the additional evidence and thereafter it is found that the abovesaid Interlocutory Application had been adjourned now and then for enquiry. Thereafter, at one stage of the matter, it is seen that in the said Interlocutory Application itself i.e., for the purpose of disposing the said Interlocutory Application, on the side of the defendants PWs 1 and 2 had come to be examined and Exs.P1 and P2 i.e., additional documents projected by them had come to be marked in the said Interlocutory Application on 29.11.2000 and thereafter, the matter stood adjourned for the cross examination of PWs 1 and 2 by the respondent/plaintiff. It is further seen that on 06.12.2000, PWs 1 and 2 were cross examined by the respondent/plaintiff and thereafter, the matter stood adjourned in the said Interlocutory Application for the evidence of the respondent/plaintiff. It is further noted that summons to witnesses had also been taken for examining the witnesses in support of the case of the plaintiff and accordingly, it is seen that on the side of the plaintiff, RWs 1 and 2 were examined and Exs.R1 to R3 had come to be marked and it is also noted that Exs.X1 to X5 had also come to be marked in the said Interlocutory Application. All the abovesaid witnesses, documents had come to be examined/exhibited only with reference to the disposal of IA No.19 of 2000. It is thus found that a detailed enquiry had been embarked upon by the first appellate Court in the abovesaid Interlocutory Application for the purpose of determining the point involved in the same i.e., whether the defendants are entitled to let in the additional evidence as projected by them by way of the said Interlocutory Application. After embarking upon the abovesaid procedure, it is found that the first appellate Court, after hearing the arguments of the respective parties, finally on 27.06.2003 i.e. on the date of the disposal of the first appeal, dismissed the said application preferred by the defendants. Even in the dismissal order passed

in the said Interlocutory Application itself, the first appellate Court had canvassed about the merits of the evidence adduced by the respective parties as above noted one way or the other and finally, dismissed the application preferred by the defendants.

9. It is found that only on 27.06.2003, the first appellate Court has disposed of the first appeal and accordingly, it is seen that the first appellate Court having dismissed the application preferred by the defendants for the reception of additional evidence, should not have further gone into the merits of the said additional evidence projected by the defendants while disposing of the first appeal or for the matter should not have also adjudicated upon the merits of the evidence projected by the plaintiff in the abovesaid Interlocutory Application, both oral and documentary as above noted, for the disposal of the first appeal. On the other hand, the first appellate Court in a very strange manner after dismissing the application preferred by the defendants for the reception of the additional evidence in IA No.19 of 2000, has proceeded to adjudicate upon the merits of the evidence adduced by the defendants as well as the plaintiff in IA. No.19 of 2000 with reference to the case projected by them in the suit and accordingly, holding that the documents projected by the defendants by way of additional evidence cannot be accepted and on the other hand, upholding the oral and documentary evidence projected by the plaintiff in IA No. 19 of 2000 for his entitlement to the reliefs sought for in the suit, resultantly, disposed of the appeal by setting aside the judgment and decree of the trial Court and thereby upheld the plaintiff's case.

10. As above noted, impugning the judgment and decree of the first appellate Court, the present second appeal has been laid and the substantial questions of law formulated in the second appeal are only with reference to the highly irresponsible manner and procedure adopted by the first appellate Court in the disposal of the abovesaid Interlocutory Application filed by the defendants for the reception of additional evidence.

11. As rightly put forth by the defendants' counsel, the first appellate Court, on the defendants filing the petition for the reception of additional evidence, after giving notice of the same to the plaintiff and inviting his objections to the same, should have disposed of the said Interlocutory Application along with the main appeal one way or the other. If in the course of the said procedure, the first appellate Court considered that the said application is devoid of merits, should have dismissed the application and proceeded to dispose of the appeal on merits. On the other hand, if the first appellate Court deemed it necessary that the additional evidence projected by the

defendants warrants acceptance, accordingly, the first appellate Court should have recorded the reasons for the same as contemplated under Order 41 Rule 27 of the Code of Civil Procedure and thereupon permitted the defendants to allow/mark such evidence in the first appeal in support of their case. Further, in case the first appellate Court felt that additional oral evidence had to be recorded in support of the additional documents projected by the defendants, considering the defence projected by the plaintiff to the same, it is also open to the first appellate Court to permit the recording of such evidence either by itself or for the limited purpose, send the matter to the trial Court or any one of the Subordinate Courts for the purpose of taking such evidence and while adopting the said procedure, the first appellate Court should also specify the points to which the evidence should be confined and recorded and accordingly, point out its reasonings in the order while directing the recording of the oral evidence with reference to the additional documents projected. When these procedures are clearly postulated and enumerated under Order 41 Rules 27 to 29 and laid down in the various decisions of the Apex Court and our High Court, without adhering to the same, it is found that the first appellate Court has adopted a novel procedure in the disposal of IA No.19 of 2000 as abovestated.

12. Accordingly, when the first appellate Court is found to have disposed of IA No.19 of 2000 without following any one of the requirements adumbrated under Order 41 Rules 27 to 29 of the Code of Civil Procedure as above mentioned and on the other hand, proceeded to record the evidence in the said Interlocutory Application itself and also permitted the recording of the oral evidence without first determining as to whether the additional evidence projected by the defendants is to be entertained or not and further also permitted the plaintiff to adduce new evidence by way of documents, coupled with oral evidence in support of the same as abovestated and to cap it all, when finally the first appellate Court had chosen to dismiss the abovesaid Interlocutory Application, despite the same, the attitude of the first appellate Court again embarking upon the merits of the evidence adduced by the respective parties in the said Interlocutory Application, in detail, for the purpose of disposing the first appeal are all found to be totally not in consonance with law and should be deprecated altogether. It is further noted that the first appellate Court while assessing the oral and documentary evidence projected by the plaintiff in IA No.19 of 2000 should have confined the same with reference to the disposal of the said application alone and should not have further endeavoured to discuss the merits of the same in the first appeal, while adjudicating the case of the parties in the first appeal, particularly, when it is noted that the said oral and documentary evidence adduced by the plaintiff had not been recorded in the first appeal as such and further, when the first appellate Court had decided to reject the additional documents

projected by the defendants and dismissed IA No.19 of 2000, thereafter the first appellate Court should not have ventured to go into the merits of the additional evidence and the oral evidence adduced by the defendants in support of the same in IA No.19 of 2000, while disposing of the merits of the first appeal. Accordingly, it is found that the first appellate Court should have proceeded with the first appeal only based upon the evidence already available in the matter and should not have proceeded to dispose of the first appeal based on the evidence adduced by the respective parties in IA No.19 of 2000 particularly when the said evidence cannot at all be construed to have been adduced and exhibited in the first appeal as such and in such view of the matter, it is found that the first appellate Court is found to have exceeded its limits in dwelling upon the evidence projected by the parties in IA No.19 of 2000 one way or the other and based on the same found to have disposed of the appeal, which cannot at all be countenanced in any manner and on the abovesaid grounds, it is found that the judgment and decree of the first appellate Court as well as the procedures adopted by the first appellate Court in disposing of the IA No.19 are all liable to be scrapped and accordingly, the judgment and decree of the first appellate Court rendered in A.S.No.3 of 2000 as well as the order passed by the first appellate Court in IA No. 19 of 2000 are liable to be set-aside and further as well as the evidence adduced by the respective parties and exhibited, both oral and documentary, in IA No.19 of 2000 are all liable to be shunned and accordingly, it is found that the matter should be again remitted back to the first appellate Court for a de novo hearing the first appeal as well as IA No.19 of 2000 filed by the defendants, with a direction to the first appellate Court to dispose of IA No.19 of 2000 afresh as contemplated under the provisions adumbrated under Order 41 Rules 27 to 29. In the light of the above discussion, the substantial questions of law formulated in the second appeal are accordingly answered.

13. In this connection, the principles of law outlined in the decision reported in CDJ 2015 MHC 5132 (Selvaraj Vs. Ravichandran & Others) and relied upon by the plaintiff's counsel are taken into consideration and followed as applicable to the case at hand.

14. In the light of the abovesaid reasonings, the judgment and decree dated 27.06.2003, passed in A.S.No.3 of 2000, on the file of the Subordinate Court, Tiruvarur are set-aside and the fair order and the decreetal order passed in IA No.19 of 2000 passed in A.S.No. 3 of 2000 are also set-aside and the oral and documentary evidence adduced by the respective parties in the said Interlocutory Application are ordered to be eschewed and accordingly, the matter stands remitted back to the first appellate Court with a direction to the first appellate Court to

dispose of IA.No.19 of 2000 along with the main appeal as contemplated under law and as above discussed, also permit the respondent/plaintiff to adduce further evidence, if any, in the first appeal, if any application is preferred by him as provided under Order 41 Rule 27 and as contemplated under law on merits and accordingly, the first appellate Court is directed to dispose of the first appeal in accordance with law and 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-VIII)

//True Copy//

Sub Assistant Registrar

sli
To

1. The Subordinate Judge,
Tiruvarur.
2. The District Munsif Court,
Thiruthuraipoondi.
3. The Section Officer,
V.R.Section,
High Court, Madras.

+1 cc to M/s. Srinath Sridevan, Advocate Sr.45147

S. A.No.1367 of 2004

NRI (CO)
EU (31/08/2018)

WEB COPY