

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.03.2018

PRONOUNCED ON : 28.03.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1263 of 2003

1.Visalakshi

2.Sundari

3.Minor Saritha

4.Minor Subha

(Minors 3 & 4 are represented
by Mother & Natural Guardian

1st Appellant) ... Appellants/Defendant 4 to 7

Vs.

1.Kasthuri Ammal ... 1st Respondent/Plaintiff

2.Krishnamoorthi

3.Subramanian ... Respondents 2&3/Defendants 2&3
(R2 & R3 given up)

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 30.12.2002 passed in A.S.No.25 of 2002 on the file of the Principal District Court, Villupuram, reversing the Judgment and Decree dated 20.09.2001 passed in O.S.No.332 of 1998 on the file of the II Additional District Munsif Court, Ulundurpet.

For Appellants : Mr.D.Rajasekar

For Respondent : Mr.K.Krishnan
No.1 for Mr.A.Siraj

For Respondent : Given up
Nos.2 & 3

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 30.12.2002 passed in A.S.No.25 of 2002 on the file of the Principal District Court, Villupuram, reversing the Judgment and Decree dated 20.09.2001 passed in O.S.No.332 of 1998 on the file of the II Additional District Court, Ulundurpet.

2. After hearing the arguments of the counsel appearing for the respective parties, finding that the matter requires to be

remitted back to the first appellate Court again for a fresh consideration of the issues involved in the matter, after affording adequate opportunities to both sides to adduce further evidence with reference to the additional evidence projected by the plaintiff by way of Ex.A6, in such view of the matter, it is unnecessary to discuss in detail about the facts involved in the matter, other than which is necessary for the purpose why this Court has determined to remit the matter back to the first appellate Court.

3. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

" (i) Whether the lower appellate Court below is correct in rejecting the evidence of DW1, who has stated that they are in absolute possession and enjoyment of the suit property, which is appurtenant land to their house?

(ii) Whether the lower appellate Court below is correct in rejecting the appellant's contention that property owned by Pakkiri Padayatchi is joined and ancestral property, when the defendants 1 and 2 as sons of Pakkiri Padayatchi lived in a State of Union under the same roof, jointly not only in estate but in food and worship?

(iii) Whether the lower appellate Court below is correct in ignoring the principle that joint and undivided family is the normal condition of Hindu Society?"

4. Accordingly, this Court finding that the substantial question of law raised by the defendants /appellants by way of C.M.P.No.1 of 2013 is entitled for acceptance and as no resistance has been offered by the first respondent/plaintiff with reference to the abovesaid petition as such, the petition C.M.P.No. 1 of 2013 was ordered on 14.03.2018 and the following substantial question of law also emerges for consideration:

" Has not the Lower Appellate Court committed an error in law by admitting additional evidence, since the respondent failed to make out any case under any one of the ingredients prescribed under Order 41 Rule 27 of CPC?"

5. The suit has come to be laid by the plaintiff against the defendants for declaration and permanent injunction.

6. Stiff resistance is projected by the defendants by way of the written statement contending that the plaintiff is not entitled to obtain the reliefs as prayed for.

7. It is found that during the course of the trial proceedings, PWS1 & 2 were examined and Exs.A1 to A5 were marked and on behalf of the defendants, DWS1 & 2 were examined and Exs.B1 to B7 were marked.

8. The trial Court, on an appreciation of the materials placed on record and after hearing the submissions of the both parties, dismissed the suit laid by the plaintiff. Aggrieved over the same, the plaintiff had preferred the first appeal.

9. It is found that during the course of the first appeal, an application has been preferred by the plaintiff in I.A.No.631 of 2002 seeking permission to mark the sale deed dated 25.03.1974, as per which, according to the plaintiff, her vendor had purchased another 1/3rd share in the entire extent of the suit property and claiming that the said document could not be produced before the trial Court as the same could not be traced at that point of time and accordingly, sought for the permission of the first appellate Court to receive the said document as additional evidence. Stiff resistance was put forth to the above said request of the plaintiff by the defendants by filing a counter contending that the plaintiff has not given sufficient cause for not producing the said document before the trial Court and no whisper has been made by the plaintiff with reference to the document projected as additional evidence during the course of the trial and further, according to the defendants, in case, the projected additional document is to be received in evidence, the same should be admitted only by letting in further proof by way of oral evidence and accordingly, prayed for the dismissal of the application preferred by the plaintiff for the reception of the additional evidence.

10. The first appellate Court has noted that the plaintiff has filed only one sale deed dated 28.05.1973, which pertains to 1/3rd interest of the suit property and further noting that the trial Court has held that the plaintiff's vendor had sold more extent than what he had acquired by way of the above said sale deed dated 28.05.1973 and finding that the projected additional document i.e. sale deed dated 25.03.1974 would go to show that as regards the remaining extent, her vendor had acquired title by way of the same, on that basis, though holding that the plaintiff has not made out a case for the non production of the

said document before the trial Court, however, further holding that the said document would throw light on the issues involved in the matter and would be essential for the adjudication of the rights of the parties, on that footing, proceeded to entertain the application preferred by the plaintiff for the reception of the additional evidence and chose to mark the additional document as Ex.A6 in support of the plaintiff's case.

11. It is thus found that even as per the first appellate Court, the plaintiff has not given sufficient cause for not placing the additional document before the lower Court. It is thus found that the plaintiff has not satisfied the ingredients for projecting the additional document as additional evidence as per Order 41 Rule 27 CPC. Still, the first appellate Court proceeds to receive the said document and according to the first appellate Court, the same would be essential to completely adjudicate the issues involved in the matter. No doubt, the first appellate Court would be entitled to receive the additional evidence on the above said ground, however, when the first appellate Court choses to receive the same, it should have considered the objection putforth by the defendants with reference to the reception of the additional document, as per the case of the defendants, the additional document should not be received in evidence straightaway without further proof of its relevancy as well as the genuineness of the same and in such view of the matter and the defence projected by the defendants, even if it is to be held that the first appellate Court's action in entertaining the additional evidence could be justified, still, when the defendants have not accepted the truth and genuineness of the said document, with reference to the same, the first appellate Court should have directed the parties concerned to adduce oral evidence as regards Ex.A6 as provided under Order 41 Rules 28 & 29 of CPC. As rightly contended by the defendants' counsel, the first appellate Court, having chosen to receive the additional document projected by the plaintiff as evidence in the matter, should have then resorted to the provisions of Order 41 Rules 28 & 29 of CPC and should have either permitted the parties to adduce oral evidence with reference to the same either before the first appellate Court or should have remitted the matter back to the trial Court or some other lower Court of competent jurisdiction to record the evidence with reference to the additional evidence and thereafter, proceeded to dispose of the appeal. On the otherhand, despite the objections putforth by the defendants as regards the validity of the additional document projected by the plaintiff, without any evidence on the same, the approach of the first appellate Court in entertaining the said document as additional evidence and further, accepting the plaintiff's case based upon the same, would only go to show that the abovesaid approach of the first appellate Court is not in accordance with

the principles of law adumbrated under Order 41 Rules 28 & 29 of CPC and it is thus found that, as rightly contended by the defendants' counsel, the first appellate Court has failed to adhere to the principles of law enunciated by this Court in the decisions reported in 2015 (5) CTC 78 (Kaliyammal Vs. Ganapathi), 2017 (2) CTC 200 (Parimalam and two others Vs. P. Mohanraj and another), (2018) 2 MLJ 64 (Muthuswami and Another Vs. Kulandaiammal and Others) and the decision of this Court dated 22.03.2007 passed in second appeal No.821 of 2006 (T. TAMILARASAN Vs. AROKKIASAMY and two others).

12. In the light of the principles of law outlined in the above said decisions, the first appellate Court, having failed to provide opportunity to the parties concerned to adduce oral evidence with reference to the projected additional evidence, particularly, enabling the defendants to cross examine the plaintiff's witnesses with reference to the said document, erred in straight away receiving the same and also upholding the plaintiff's case, on the basis of the said document, would only go to show that there has been a clear violation of the principles of law as pointed out in the above decisions and in such view of the matter, I deem it fit to remit the matter back to the first appellate Court with the direction to the first appellate Court to take up the first appeal on file and thereafter, provide adequate opportunities to the parties concerned to adduce further oral evidence with reference to the abovesaid projected additional document marked as Ex.A6 and after the same, proceed to dispose of the appeal in accordance with law.

13. For the reasons aforesaid, the Judgement and Decree dated 30.12.2002 passed in A.S.No.25 of 2002 on the file of the Principal District Court, Villupuram, are set aside and the matter is remitted back to the first appellate Court with a direction to the first appellate Court to afford adequate opportunities to both the parties to adduce evidence with reference to the additional document received in the matter and marked as Ex.A6 and thereafter, endeavour to dispose of the first appeal on merits and in accordance with law. The second appeal is disposed of accordingly. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CS-)

//True Copy//

Sub Assistant Registrar

sms

To

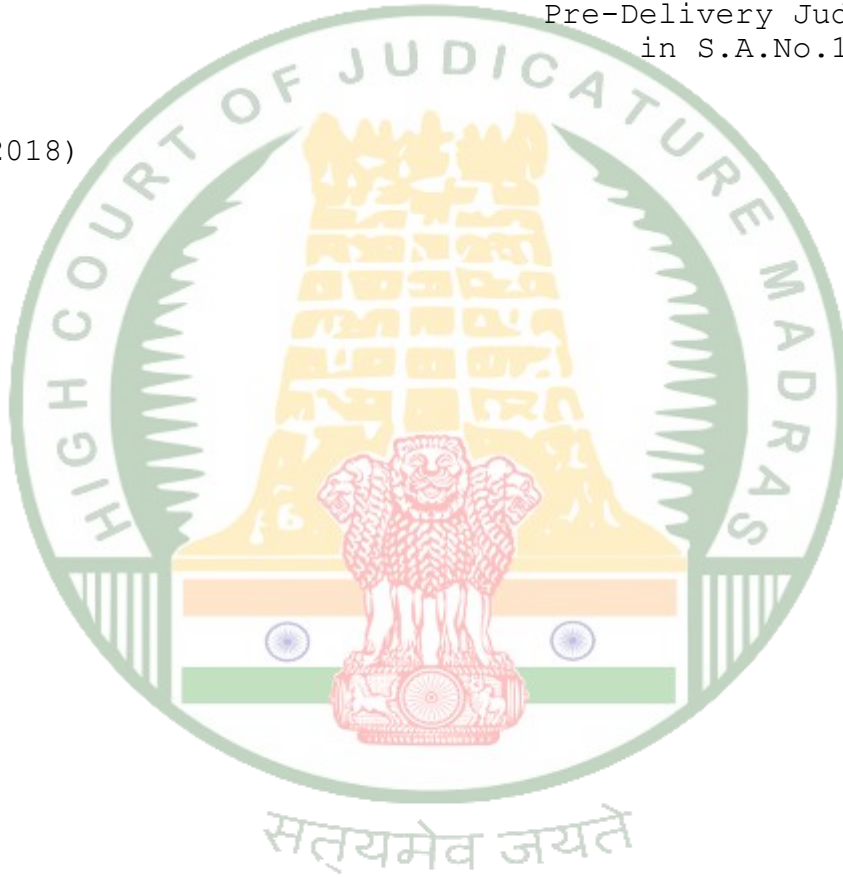
1. The Principal District Judge, Villupuram.
2. The II Additional District Judge, Ulundurpet.
3. The Section Officer, V.R. Section, High Court, Madras. (2 COPIES)

+1cc to Mr.R.BALAKRISHNAN, Advocate, S.R.No.23737

+1cc to Mr.A.SIVAJI, Advocate, S.R.No. 23827

Pre-Delivery Judgment made
in S.A.No.1263 of 2003

EV(CO)
TR(18/04/2018)



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