

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.02.2018

PRONOUNCED ON : 09.03.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.1526 of 2003

1. Bhanu
2. Dhanam
3. Gomathi

... Appellants/Appellants/Defendants

Vs.

V.K.Iyyanathan

... Respondent/Respondents/Plaintiff

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 05.04.2002 passed in A.S.No.38/96 on the file of the Additional District Judge (Fast Track Court IV) at Poonamallee confirming the Judgment and decree, dated 02/01/1996 in OS.No. 416 of 1983 on the file of the District Munsif, Poonamallee.

For Appellants : Mr. V.Manoharan

For Respondent : No appearance/Set ex-parte
Vide order dated 20.02.2018

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 05.04.2002 passed in A.S.No.38/96 on the file of the Additional District Judge (Fast Track Court IV), Poonamallee, confirming the judgment and decree dated 02.01.96 passed in O.S.No.416/83 on the file of the District Munsif Court, Poonamallee.

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

1. Whether the lower appellate Court is justified in disposing of the appeal without even framing issues as required under Order XIV Rule 1 of C.P.C.
2. Whether the lower appellate Court is justified in admitting additional evidence without following the procedure laid down under Order 41 Rules 28 and 29 of C.P.C.
3. Whether the lower Courts are justified

in admitting xerox copies of documents (Exs.A1 to A7) in the absence of any explanation and satisfactory reasons for not producing original.

4. Is not the finding that the defendant (Appellant) had no oral evidence to prove his title and possession, ignoring the evidence of DW1, DW2 and DW3 is perverse?

5. Is not the finding that to get assessed to property tax and to pay property tax, one need not be the owner of the same, a perverse finding?

3. Inasmuch as this Court finds that the judgment and decree of the first appellate Court impugned in the second appeal are found to be vitiated on many counts as discussed infra, it is unnecessary to discuss the facts involved in the matter in detail, as it is proposed to remit the matter back to the first appellate Court for a fresh consideration of the issues involved in the matter.

4. The suit has been laid by the plaintiff for declaration and permanent injunction or in the alternative for recovery of possession.

5. In support of the plaintiff's case PWs 1 to 3 were examined, Exs.A1 to A46 were marked. On the side of the defendants DWs 1 to 3 were examined, Exs.B1 to B62 were marked.

6. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to grant the reliefs of declaration and permanent injunction in favour of the plaintiff as prayed for and accordingly disposed of the suit laid by the plaintiff.

7. Aggrieved over the judgment and decree of the trial Court, it is found that the legal representatives of the deceased defendant preferred the first appeal and the first appellate Court has permitted the plaintiffs to mark additional evidence in support of their case as Exs.A47 to A50 and accordingly, based on the materials placed, seem to have dismissed the first appeal, thereby confirming the judgment and decree of the trial Court. Challenging the correctness of the same, the present second appeal has been preferred.

8. Inter alia, two main contentions are putforth by the

defendants' counsel for interfering with the judgement and decree of the first appellate Court. Firstly, it is contended by the defendants' counsel that the first appellate Court is not justified in admitting the additional evidence and further, according to him, the first appellate Court while admitting the additional evidence projected by the plaintiffs has chosen to straight away rely upon the same, without following the mandatory provisions stipulated under the Order 41 Rules 28 and 29 of the Code of Civil Procedure and the above said infraction committed by the first appellate Court vitiates its judgment and therefore, the same is liable to be set aside.

9. As above seen, the first appellate Court seems to have permitted the plaintiff to adduce additional evidence and it is found that with reference to the same, I.A. 369/2001 has been preferred by the plaintiff for the reception of the additional documents. As seen from the judgment of the first appellate Court, the additional evidence projected by the plaintiffs were on the footing that the said documents have come to be received by the plaintiffs only after the closure of their evidence before the trial Court and accordingly, as the said documents were not available and traceable during the course of trial, the same could not be marked before the trial Court and hence, prayed for the reception of the additional evidence. The defendants strongly opposed the request of the plaintiff contending that the documents projected as additional evidence should have been filed before the trial Court itself and hence, the petition is liable to be dismissed. The first appellate Court, despite the serious opposition putforth by the defendants for the reception of the additional evidence, on the footing that the said documents are supporting the plaintiff's reliefs and their contention of the assertion of the possessory title in respect of the suit property, accordingly, proceeded to entertain the application for the reception of the additional evidence and marked the same as Exs.A47 to A50. The above is the only reason given by the first appellate Court for the reception of the additional evidence. It is thus found that as rightly putforth by the defendants' counsel, no discussion at all has been made by the first appellate Court as to whether the plaintiffs have satisfied the requirements of Order 41 Rule 27 of the Code of Civil Procedure for enabling them to file the additional evidence at the first appellate stage. Even assuming for the sake of arguments, the plaintiffs had satisfied the above said ingredients for the reception of the additional evidence, still, inasmuch as the defendants had thrown a serious challenge to the above said additional evidence, the first appellate Court on holding that the said documents can be received as additional evidence, should have resorted to the principles of law adumbrated under Order 41 Rules 28 and 29 of the Code of Civil Procedure and thereby, should have endeavoured

and enabled the parties to adduce oral evidence with reference to the additional documents projected by the plaintiff as contemplated under the above said rules, either on its own or by giving a suitable direction to the trial court or any other subordinate court as provided under law and only thereafter should have either relied upon the above said additional evidence in support of the plaintiffs or reject the same in support of the defendants as the case may be and proceeded to dispose of the first appeal accordingly. On the other hand, as above seen, the first appellate Court by simply holding that the said documents are supporting the plaintiff's case and his possessory title chosen to receive the said documents as Exs.A47 to A50. No discussion at all has been made about the resistance offered by the defendants with reference to the reception of the additional evidence and further more, despite the stance of the defendants that the additional documents should not be received without affording an opportunity to the defendants to cross examine the plaintiff's witnesses with reference to the additional evidence and also not permitting the parties to adduce oral evidence as regards the additional evidence sought to be projected as contemplated under Order 41 Rules 28 and 29 of the Code of Civil Procedure, straight away proceeded to receive and mark the same and it is further found that mainly based upon the additional evidence, the first appellate Court seems to have accepted the plaintiff's case and thereby, dismissed the first appeal preferred by the defendants. Thus, it is found that the first appellate Court has completely not adhered to the rules with reference to the reception of the additional evidence as contemplated under Order 41 Rules 27 to 29 of the Code of Civil Procedure and it is thus found that there is a clear violation of the principles of law surrounding the same as pointed out in the decisions reported in (2018) 1 MLJ 846 (Anandan (deceased) and others vs. Kannaiyan and others) and (2018) 2 MLJ 64 (Muthuswami and Another Vs.Kulandaiammal and others). In such view of the matter, it is found that the approach of the first appellate Court in straightaway receiving the additional evidence as the supporting documents in favour of the plaintiff's case without enabling the defendants to challenge the same by way of the cross examination, it is found that the judgment and decree of the first appellate Court based upon the additional evidence is liable to be set-aside and the matter requires to be remitted back to the first appellate Court to follow the procedures contemplated under Order 41 Rules 28 and 29 of the Code of Civil Procedure as regards the adduction of the oral evidence with reference to the additional evidence so as to enable the parties concerned to putforth their case, with reference to the same, as per law.

10. Secondly, it is found that there is absolutely no discussion at all made by the first appellate Court as to the

merits of the case in any manner and apart from the reception of the additional evidence in support of the plaintiff's case as aforesaid and after detailing the arguments put forth by the plaintiff's counsel and the defendants' counsel with reference to the documents marked on either side, it is found that the first appellate Court, from paragraphs 14 of its judgment, has in ditto reproduced the judgment of the trial Court till paragraphs 19, which corresponds to the paragraphs 6 to 11 of the trial Court judgment and in such view of the matter, it is found that as rightly contended by the defendants' counsel, there is absolutely no discussion made by the first appellate Court on the merits of the case as contemplated under law.

11. The right of appeal provided under Section 96 of the Code of Civil Procedure is a valuable right of the litigant and the jurisdiction of the first appellate Court while hearing the first appeal is very wide like that of the trial Court and it is open to the appellant to attack all the findings of the facts or/ and of law in the first appeal and accordingly, it is the duty of the first appellate Court to appreciate the entire evidence and to arrive its own independent conclusions, for reasons assigned, either of affirmation or difference and the above said principles of law enunciated by the Apex Court following the judicial pronouncements of the Apex Court and other High Courts as reported in (2018) 1 SCC 604 (C.Venkata swamy Vs. H.N.Shivanna (dead) by legal representatives and another) having not been followed by the first appellate Court, it is found that the judgment of the first appellate Court cannot be said to be in conformity with the requirements of the order 41 rule 31 of the Code of Civil Procedure and in such view of the matter, the judgment and decree of the first appellate Court are liable to be set-aside and the matter requires to be remitted back to the first appellate Court for a fresh consideration of the issues involved in the matter, after enabling the parties concerned to adduce further evidence as above discussed, with reference to the additional documents projected as well as any other evidence that may be projected by the parties concerned which could be received under law.

12. The principles of the proper mode of the disposal of the first appeal have been enunciated by the Apex Court in the above said decision of the Apex Court in (2018) 1 SCC 604 (C.Venkata swamy Vs. H.N.Shivanna (dead) by legal representatives and another) as follows:

Civil Procedure Code, 1908 - S.96 and
Or.41 R.31- First appeal - proper mode of
disposal of - Principles reiterated - Held,
as first appellate Court dismissed appeals
very cursorily and without undertaking any
appreciation of evidence, dealing with

various issues arising in case and discussing arguments raised by parties in support of their case, disposal of two first appeals could not be said to be in conformity with requirements of S.96 r/w Or.41 R.31 CPC - Hence, remanded for disposal afresh.

-It is a settled principle of law that a right to file first appeal against decree under S.96 of Code is a valuable legal right of litigant - Jurisdiction of first appellate court while hearing first appeal is very wide like that of trial Court and it is open to appellant to attack all findings of fact or/and of law in first appeal.

-It is duty of first appellate Court to appreciate entire evidence and arrive at its own independent conclusion, for reasons assigned, either of affirmation or difference - Similarly, powers of first appellate Court while deciding first appeal are indeed well defined by various judicial pronouncements of Supreme Court and are, therefore, no more res integra

- Remanding case to High Court for deciding appeals afresh on merits in accordance with law keeping in view observations made above, however, clarified that refrained from making any observation on merits of controversy - Since appeals are quite old, High Court to decide appeals expeditiously uninfluenced by any observations in accordance with law - Impugned judgment set aside.

Santhosh Hazari V.Purushottam Tiwari, (2001) 3 SCC 179; Madhukar V. Sangram, (2001) 4 SCC 756; H.K.N. Swami V. Irshad Basith, (2005) 10 SCC 243; Jagannath V. Arulappa, (2005) 12 SCC 303; B.V.Nagesh V. H.V.Sreenivasa Murthy, (2010)13 SCC 530: (2010)4 SCC (Civ)808; SBI v. Emmsons International Ltd., (2011) 12 SCC 174: (2012) 2 SCC (Civ) 289; Union of India V.K.V.Lakshman, (2016)13 SCC 124: (2017) 2 SCC (Civ) 230, relied on

Kurian Chacko V.Varkey Ouseph, 1968 SCC Online Ker 101: AIR 1969 Ker 316, approved

C.Venkata Swamy V. H.N.Shivanna, RFA Np. 158
of 2005, order dated 2.11.2006 (KAR),
reversed.

13. In the light of the above discussions, it is found that the first appellate Court has erred in disposing of the first appeal without conforming to the legal requirements of Section 96 read with order 41 rule 31 of the Code of Civil Procedure and it is further found that the first appellate Court has erred in receiving the additional evidence projected by the plaintiff without following the mandatory directions laid down under Order 41 Rules 28 and 29 of the Code of Civil Procedure and accordingly the substantial questions of law 1 and 2 formulated in the second appeal are answered in favour of the defendants and against the plaintiff.

14. Inasmuch as the judgment and decree of the first appellate Court are being set aside for the reasons aforesaid and the matter is being remitted back to the first appellate Court for a fresh consideration of the issues involved, as above discussed, in my considered opinion the other substantial questions of law touching upon the merits of the case are not required to be answered at this stage of the matter and accordingly left unanswered.

15. In conclusion the judgment and decree dated 05.04.2002 passed in A.S.No.38/96 on the file of the Additional District Judge (Fast Track Court IV), Poonamallee are set aside and the matter is remitted back to the first appellate Court with a direction to take up the first appeal on file and after providing adequate opportunity to both sides to adduce further evidence with reference to the additional documents projected by the plaintiff in the matter and as well as the other aspects of the matter as provided under law and thereafter, the first appellate Court is directed to dispose of the first appeal after arriving at its own independent conclusion as regards the evidence adduced by the respective parties, both oral and documentary and accordingly dispose of the first appeal in conformity with the principles enunciated under section 96 and Order 41 rule 31 of the Code of Civil Procedure. The second appeal is disposed of accordingly with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CS V)

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Sub Assistant Registrar

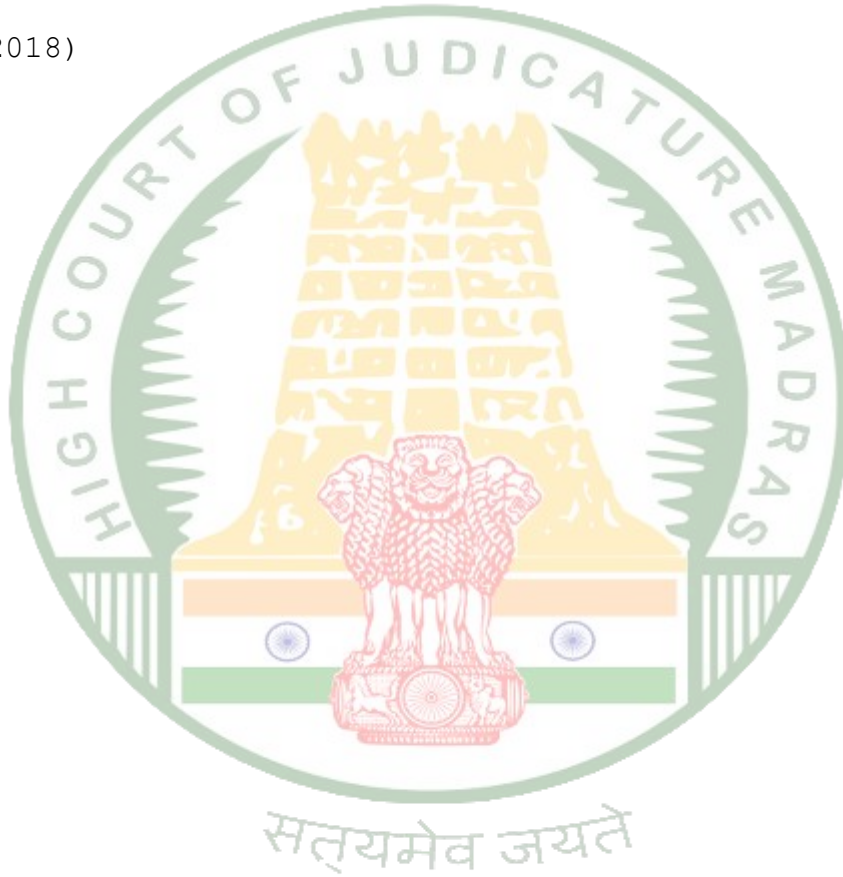
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To

1. The Additional District Judge
(Fast Track Court IV), Poonamallee,
2. The District Munsif Court,
Poonamallee.

S. A.No.1526 of 2003

GJ (CO)
GN(12/04/2018)



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