

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.12.2017

PRONOUNCED ON: 04.01.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A. No.1177 of 2001

and
C.M.P.No.234 of 2012
&
C.M.P.No.19032 of 2017

Kaliga Raja alias Kalivaradhan ... Appellant

Vs.

Vaidyanathan ... Respondent

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 19-02-2001 passed in A.S.No.75 of 2000 on the file of the learned Principal District Judge, Pondicherry confirming the Judgment and decree dated 29-10-1999 passed in O.S.No.541 of 1997 on the file of the III Additional District Munsif, Pondicherry.

For Appellant : Mr.S.Subramanian

For Respondent : Mr.T.P.Manoharan
for M/s.K.P.Jothieswaran

सत्यमेव जयते

J U D G M E N T

This second appeal is directed against the judgment and decree dated 19-02-2001 passed in A.S.No.75 of 2000 on the file of the Principal District Court, Pondicherry confirming the Judgment and decree dated 29-10-1999 passed in O.S.No.541 of 1997 on the file of the III Additional District Munsif Court, Pondicherry.

2. The parties are referred to as per the rankings in the trial court.

3. Suit for permanent injunction.

4.After hearing the counsel for the respective parties, inasmuch as I propose to remit the matter back to the first appellate court for the determination of the controversies arising in the matter afresh, I feel it is unnecessary and not expedient to deal with the facts of the case in detail, as well as the determination of the issues one way or the other as the same would cause serious prejudice to either of the parties.

5.The plaintiff laying claim to the suit property based on the sale deed dated 09.03.1988 executed by Kuppusamy Reddiar and claiming that the suit property is in his possession and enjoyment, had laid the suit against the defendant for permanent injunction alleging that the defendant is illegally attempting to interfere with his possession and enjoyment of the suit property.

6.The defendant has taken a plea in the written statement that the sale deed dated 09.03.1988 relied upon by the plaintiff for claiming title and possession in respect of the suit property is not a true document and it is only a sham and nominal document and therefore the plaintiff cannot claim any right over the property by virtue of the said document and hence according to the defendant the suit laid by the plaintiff is liable to be dismissed. The defendant has also challenged the purchase of the suit property by Kuppusamy Reddiar from Sivalinga Counder by way of the sale deed dated 22.02.1988.

7.On the above said contentions, the parties went for trial and in support of the plaintiff's case, P.W.1 has been examined. Exs.A1 to A6 were marked. On the side of the defendant, D.Ws.1 to 3 were examined. No document has been marked.

8.On a consideration of the oral and documentary evidence adduced by the respective parties, the Courts below did not accept the plaintiff's case and dismissed the suit. Impugning the same, the present second appeal has come to be laid.

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

(1)In view of the bar contained in Section 90 of the Indian Evidence Act, whether the reliance placed on the deposition of DW-2, the Seller and vendor under Ex.A-4 and A-5 can be permitted?

(2)In view of the transfer of property

having taken place under Ex.A-4 and A-5 is it open to the respondent to question the sale effected by persons having title to the property especially in a suit for injunction?

10.It is seen that in the first appellate court, the plaintiff has preferred an application under Order 41 Rule 27, r/w.Section 151 of the Code of Civil Procedure for the reception of the additional documents in support of his case in I.A.No.12 of 2001, it is further found that the said application has been laid well in advance prior to the disposal of the first appeal and it is further seen that the defendant has also filed the counter to the said application contesting the same. However, the first appellate court after dismissing the appeal filed by the plaintiff, as regards the I.A.No.12 of 2001, is found to have dismissed the petition on the footing that in view of the disposal of the appeal the said petition is liable to to be dismissed. It is thus found that the first appellate court has not disposed of I.A.No.12 of 2001, on the merits of the same and on the other hand, dismissed the said application inasmuch as the first appeal had been disposed of by it. Therefore, it is seen that without considering the merits of the I.A.No.12 of 2001, the same had been come to be dismissed by the first appellate court and accordingly, it is seen that the plaintiff has laid a similar application in this second appeal in C.M.P.No.234 of 2012 for the reception of the said additional documents as additional evidence in the second appeal.

11.It is also found that the plaintiff has preferred C.M.P.No.19032 of 2017 for formulating additional substantial question of law in the second appeal as regards the failure of the first appellate court in not considering the merits of the case of the parties while disposing of I.A.No.12 of 2001 contending that the first appellate court has not disposed of the said application in accordance with the principles of law.

12.When it is admittedly found that the first appellate court has not disposed of I.A.No.12 of 2001 in accordance with the provisions contained in Order 41 Rule 27 of the Code of Civil Procedure, it is seen that the same has caused serious miscarriage of justice to the plaintiff. As per Order 41, Rule 27 of Code of Civil Procedure, it is seen that the first appellate court while disposing of an application filed under the above provision of law, should see whether the documents projected had been refused to be admitted as evidence by the trial court which ought to be admitted or should have determined whether the party projecting the additional evidence has given sufficient cause for not producing the same before the trial court or the first appellate court should determine

whether the additional documents projected are necessary for enabling it to pronounce the judgment and decree or the first appellate court determine whether the documents projected as additional evidence are required for any other substantial cause and if and only on the determination of the above said points one way or the other, the first appellate court would be competent to dispose of the application for the reception of the additional evidence either by way of accepting the same or rejecting the same. However, insofar as this case is concerned, it is seen that the first appellate court has not gone into the above said aspects of the matter and instead, dismissed the above said application on the footing that the first appeal has been disposed of. It is thus found that, as rightly argued by the plaintiff's counsel, the disposal of I.A.No.12 of 2001 by the first appellate court is not in accordance with law.

13.The counsel for the defendant contended that the plaintiff has not made out necessary averments for the entertainment of the said application as provided under clause (a) and clause (aa) as adumbrated in Order 41, Rule 27 and hence the dismissal of the above said application by the first appellate court is in accordance with law. However, when it is seen that the first appellate court should also determine whether the additional document projected are necessary for enabling it to pronounce the judgment and decree or for any other substantial cause and when, with reference to the same, there is no determination by the first appellate court, in any manner, it is seen that the omission of the plaintiff to mention specifically the reasons as mandated under clause (a) or clause (aa) as provided under Order 41 Rule 27 CPC would not by itself in any manner militate against the merits of the application. Even otherwise, the first appellate court should have gone into the question whether the additional documents projected are required as provided under clause(b) of Order 41 Rule 27 CPC. However, as above seen, the first appellate court has not disposed of the above said application on merits as per law. Therefore, the above contention projected by the defendant's counsel for upholding the dismissal of I.A.No.12 of 2001 by the first appellate court as such cannot be accepted.

14.According to the defendant's counsel the Will projected by way of additional documents is a fabricated document and also goes against the case of the plaintiff and therefore the said document need not be received as additional evidence. However, with reference to the same, as regards the above said contention, in my considered opinion, the same has to be decided by the first appellate court one way or the other and sans the same, this court sitting in the second appeal, in my considered opinion, should not dwell upon the said point, as the determination of the said point by this court one way or the

other, would deprive the valuable right of the concerned parties in loosing an opportunity of contesting the same by way of further appeal. On the other hand, if the same is directed to be determined by the first appellate court one way or the other, the affected party would be having an opportunity to contest the same by way of the second appeal in this Court. In such view of this matter, the above contentions raised by the defendant's counsel are not gone into in detail and the same is left to the determination of the first appellate court.

15.It is further argued by the defendant's counsel that the plaintiff has not preferred any appeal against the dismissal of the I.A.No.12 of 2001 and therefore has precluded from raising the said issue in the second appeal, as according to him the same is also not raised as a ground in the second appeal. Countering the same, it is argued by the plaintiff's counsel that he has preferred the second appeal on various grounds, including among the other grounds he may be entitled to raise and when accordingly, he has laid the objection with reference to the same in C.M.P.No.19032 of 2017 for raising the said issue by way of additional substantial question of law, it is his contention that the same should be considered as a ground raised in the second appeal and therefore it is further contended that there is no need for the plaintiff to prefer any separate appeal against the order of dismissal of I.A.No.12 of 2001. The above contention of the plaintiff's counsel merits acceptance. When it is found that the dismissal of I.A.No.12 of 2001 by the first appellate court is completely against the cannons of well established principles of law and the first appellate court had failed to determine the essential points as provided Order 41 Rule 27 CPC while disposing of the said application, when it is seen that the plaintiff has also raised the same as a substantial question of law by way of C.M.P.No.19032 of 2017, on the above said ground alone, in my considered opinion, the second appeal requires to be disposed of and the matter remitted back to the first appellate court to consider the merits of the case of the respective parties afresh.

16.In the light of the above position, the various authorities referred to by the respective counsel in support of their contentions on the merits of the case are not dealt with in this second appeal.

17.Inasmuch as the first appellate court has failed to dispose of I.A.No.12 of 2001 on merits and in accordance with law and as the same has resulted in a serious miscarriage of justice, in my considered opinion , the judgment and decree of the first appellate court cannot be allowed to sustain further and accordingly the same are set aside.

18.In the light of the above reasons the judgment and decree dated 19-02-2001 passed in A.S.No.75 of 2000 on the file of the Principal District Court, Pondicherry are set aside and the matter is remitted back to the first appellate court with a direction to the first appellate court to dispose of the above appeal preferred by the plaintiff afresh along with I.A.No.12 of 2001 after providing opportunity to the parties concerned to place submissions with reference to their respective cases in accordance with law as expeditiously as possible. Accordingly, the second appeal is disposed of. C.M.P.No.19032 of 2017 is allowed. Consequently, Connected miscellaneous petition, if any is, closed.

Sd/-
Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

mfa

To

- 1.The Principal District Judge, Pondicherry.
- 2.The III Additional District Munsif, Pondicherry.

Copy to

The Section Officer, V.R. Section, High Court, Madras.

+1cc to Mr.K.P.JOTHEESWARAN, Advocate, S.R.No.741

+1cc to Mr.S.SUBRAMANIAN, Advocate, S.R.No.728

Pre-delivery judgment made in
S.A. No.1177 of 2001

SVI (CO)
TR(30/01/2018)

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