



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 27.07.2018

C O R A M

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**THE HONOURABLE MR. JUSTICE M. SUNDAR**

SA(MD) No.234 of 2018

Rejitharani

... Appellant

**Vs.**

Ayyappan

... Respondent

**PRAYER:** Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908, to set aside the judgment and decree dated 04.01.2017 in A.S.No.42 of 2015 by the Subordinate Judge at Padmanabapuram confirming the judgment and decree dated 26.03.2015 in O.S.No.334 of 2011 passed by the Principal District Munsif at Padmanabapuram with cost.

For Appellant : Mr.S.Ramakrishnan  
For Respondent : Mr.V.Meenakshisundaram

**JUDGMENT**

This litigation commenced on 16.09.2011 when one Ayappan filed a suit in O.S.No.334 of 2011 on the file of 'Principal District Munsif's Court, Padmanabapuram', (herein after referred to as 'Trial Court' for the sake of convenience and clarity)

2.C.Ayyappan is the sole plaintiff and one S.Rejitharani is the lone defendant.

3.From hereon the parties in the instant second appeal shall be referred to by their respective ranks in the Trial Court, for the sake of convenience and clarity.

4.Suit was filed with three main prayers. First prayer is for declaration of title, second prayer is for recovery of possession and third prayer is for injunction *qua* alteration of physical features and subletting. Usual residuary prayer and costs prayer are also there.

5.The property, which is subject matter of aforesaid suit is land and measures 3.897 cents or thereabouts together with a superstructure thereon at Door No.5 - 90 situated in



R.S.No.589/12, Old survey No.1609, Midalam Village, Vilavancode Taluk in Kanyakumari District.

6.The property, which is subject matter of the aforesaid suit is described in the schedule to the plaint as follows:

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**'SCHEDULE OF PROPERTY**

|                                |                                                                                                                                                     |
|--------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>District</i>                | <i>:Kanyakumari</i>                                                                                                                                 |
| <i>Taluk</i>                   | <i>:Vilavancode</i>                                                                                                                                 |
| <i>Village</i>                 | <i>:Midalam</i>                                                                                                                                     |
| <i>Old Sy.No</i>               | <i>:1609</i>                                                                                                                                        |
| <i>Re.Sy.No.</i>               | <i>:589/12</i>                                                                                                                                      |
| <i>Door No.</i>                | <i>:5-90</i>                                                                                                                                        |
| <i>Extent</i>                  | <i>:3.897 cents</i>                                                                                                                                 |
| <i>Description of property</i> | <i>:3.897 cents of land with building bearing Karungal Town Panchayat Door No.5-90 situated in Re.Sy.589/12 (Old Sy.No.1609) of Midalam Village</i> |

**Boundaries:**

|              |                               |
|--------------|-------------------------------|
| <i>East</i>  | <i>:Chellappan's property</i> |
| <i>West</i>  | <i>:Road</i>                  |
| <i>South</i> | <i>:Chellappan's property</i> |
| <i>North</i> | <i>:Rajayyan's property'</i>  |

The aforesaid property shall herein after referred to as 'suit property' for the sake of convenience and clarity.

7. I have heard Mr.S.Ramakrishnan, learned Counsel appearing for the defendant, who is the sole appellant before this Court.

8.Mr.V.Meenakshi Sundaram, learned Counsel representing the Counsel on record for Caveator is also before this Court.

9.Be that as it may, it may be necessary to notice the trajectory of the litigation in the Courts below.

10.In the Trial Court the pleading of the plaintiff in brief is that he purchased the suit property from two persons who go by the names Santhakumar and Selvamony vide sale deeds dated 11.10.2010 and 13.06.2011 (Ex.A1 and Ex.A2). It is the further case of the plaintiff that the defendant was in permissive occupation of the suit property under his vendors.

11.At the time of sale, though plaintiff's vendor handed over possession, the defendant sought for some more time to vacate and hand over vacant possession of the suit property to the



plaintiff, which was granted, but, the same was breached, resulting in the suit.

12. Defendant, who entered appearance, set up a plea that the plaintiff is none other than her spouse Santhakumar's brother-in-law. It is also the defendant's case that there is matrimonial discord between her and her spouse and that her spouse had played into the hands of his brother-in-law.

13. To be noted, the defendant made a counter claim also. Counter claim was essentially to the effect that the aforesaid two sale deeds being Ex.A1 and Ex.A2 are invalid. It may be necessary to extract and reproduce the counter claim, which is set out in sub paragraph A and B of Paragraph 19 of the written statement. The Counter claim reads as follows:

*'19 A. Hence it is highly necessary to grant a decree of declaration in favour of the Defendant by counter claim, declaring the sale deeds dated 11/10/2010 and 13/06/2011 as the nominal, sham, null and void and thereby declaring the Defendant's right over the suit schedule property of 3.897 cents of land and building bearing door No.5-90 situated in Re-Survey No.589/12 of Midalam Village and for a consequential and permanent injunction restraining the Plaintiff from interfering the Defendant's peaceful possession (Written Statement Amended as per order in I.A.No.7999/2013 dated on 17.02.2014)*

*19B. For the purpose of Court Fee and jurisdiction, the counterclaim is valued at Rs.85,900/- and a court fee of Rs.6,442.50/- is paid under Sec.25 of (b) of the Tamil Nadu Court Fees and Suits Valuation Act XIV of 1955 (Written Statement Amended as per order in I.A.No.799/2013 dated 17.02.2014) '*

14. On the aforesaid rival pleading, the Trial Court framed three issues and two additional issues which read as follows:

*'5. After perusing the pleadings adduced by both parties this Court has framed the following three friable issues:-*

*1. Whether the plaintiff is entitled to get a decree for declaration of title and recovery of possession as prayed for?*

*2. Whether the plaintiff is entitled to get a decree for permanent injunction as prayed for?*

*3. To what other reliefs the plaintiff is entitled for?*

*On perusal of case records, on 23.04.2014 this Court framed the following additional issues for proper adjudication.*



1. Whether the defendant is entitled for the relief of declaration that the sale deeds dated 11.10.2010 and 13.06.2011 are sham, nominal and null and void as prayed for?

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2. Whether the defendant is entitled for the relief of declaration of her title over the suit schedule property of 3.897 cents of land and building bearing Door No.5-90 situated in R.S.No.589/12 of Midalam Village with consequential permanent injunction as prayed for?'

15. Parties went to trial on the aforesaid issues. Three witnesses, ie., PW.1 to PW.3 were examined on behalf of plaintiff. Plaintiff Ayyappan examined himself as PW.1. The aforesaid Santhakumar was examined as PW.3. As many as 20 documents being Ex.A1 to Ex.A20 were marked on behalf of plaintiff.

16. To be noted, Ex.A17 to Ex.A20 are series. On the side of the defendant, the sole defendant examined herself as DW.1. Eleven documents being Ex.B1 to Ex.B11 were marked.

17. After full contest and trial in the aforesaid manner, vide judgment and decree dated 26.03.2015, Trial Court decreed the suit as prayed for in favour of the plaintiff and negatived the counterclaim made by the sole defendant.

18. Sole defendant carried the matter in appeal by way of a regular first appeal under Section 96 of 'The Code of Civil Procedure, 1908' (herein after referred to as 'CPC' for brevity). This regular first appeal is AS No.42 of 2015 on the file of 'Subordinate Judge's Court, Padmanabapuram' (herein after referred to as 'First Appellate Court' for the sake of convenience and clarity).

19. The sole plaintiff in the suit was obviously sole respondent in the first appeal, he had entered appearance in his capacity as sole respondent in the first appeal and contested the appeal.

20. The First Appellate Court in accordance with the requirement under Order XLI Rule 31 CPC framed issues for determination / points for consideration, which are two in number. These two points for determination / consideration are articulated in paragraph 8 of the judgment of the First Appellate Court, which reads as follows:

<https://hcservices.ecourts.gov.in/hcservices/>

8. இதுதான் மேல் முறையீட்டில் தீர்மானிக்கப்படவேண்டிய பிரச்சனைகள்

1. விசாரணை நீதிமன்றத்தின் தீர்ப்பும் தீர்ப்பு பரணையும் சட்டத்திற்கும். சட்ட சியத்திற்கும் புறம் பானதாக சொல்லப்படுவது சரியானதா? அதில் குறுக்கீடு



செய்ய வேண்டிய அவசியம் ஏற்பட்டுள்ளதா?

2.இந்த மேல் முறையீடு அனுமதிக்கத்தக்கதா?

First Appellate Court, vide judgment and decree dated 04.01.2017 dismissed the first appeal, confirming the Trial Court decree .

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21.Defendant has now carried the matter to this Court, by way of instant second appeal. This second appeal was filed with delay.

22.It is not in dispute that in the interregnum an Execution Petition in EP No. 7 of 2017 on the file of Trial Court (which is also an Executing Court) has been launched by the plaintiff and it is not in dispute that an order for delivery of the suit property has also been made on 23.11.2017.

23.Under aforesaid circumstances, the instant second appeal is before me.

24.Mr.S.Ramakrishnan, learned Counsel for the defendant (who is 'sole appellant' in the instant second appeal, who shall from hereon in this judgment shall be referred to as 'appellant' for the sake of convenience and clarity) submitted that the Courts below erred in wrongly placing the burden of proof on the appellant. It was also contended by learned Counsel Mr.Ramakrishnan that Ex.A.1 and Ex.A.2 sale deeds in favour of the plaintiff are sham, null and void and that they should be declared so.

25.The appellant as protagonist of this second appeal has proposed three questions and styled them as substantial questions of law. The three questions proposed by the appellant as protagonist of the instant second appeal, as they emerge from the memorandum of grounds of second appeal, are as follows:

*'(i) Whether wrongly placing the burden of prove of the appellants and deciding the case against them vitiated the judgment of the Courts below.*

*(ii) The judgment and decree of the lower court, appellant court without considering the evidence of the plaintiff has vitiated the judgment and decree and this has resulted in justice and this involves substantial question of law.'*

*(iii) The decision rendered by the Courts below gave a finding that the exhibit A 1 and A2 in favour of the the plaintiff are sham, null and void, has the judgment and decree and this has resulted in justice and this involves substantial question of law.'*

<https://hcservices.hccourts.gov.in/hcservices>

26.I have heard learned Counsel for appellant, perused the



judgment of the Courts below and examined the aforesaid questions.

27. It is seen that the appellant, who is defendant in the Trial Court has made a counterclaim. The moment counterclaim is made, the same becomes a plaint by itself and the defendant definitely has burden of proof cast on her. Even under the normal circumstances, though burden does not shift, onus shifts. The moment the defendant pleads that Ex.A1 and Ex.A2 are invalid, sham, the onus shifts to the defendant.

28. A careful examination of the judgment of the Courts below, reveal that on cogent analysis of the oral and documentary evidence before them, they have come to the conclusion that Ex.A1 and Ex.A.2 are not sham.

29. It is also to be noted, that the plaintiff's vendor has put the plaintiff in possession (obviously juridical possession) of the suit property, but the plaintiff at the request of the defendant / appellant permitted the defendant / appellant to continue to be in the suit property for some more time, which was ultimately breached. All these have been returned as findings of the Courts below, on cogent and careful analysis of oral and documentary evidence.

30. It is not anybody's case before this Court that there is perversity in appreciation of evidence. Therefore this Court finds no grounds or reasons to interfere with the judgments of the Courts below.

31. Be that as it may, the three questions proposed by the appellants and styled as substantial questions of law were also examined by applying **Rimmalapudi** principle. The principle that a substantial question of law is vastly different from mere question of law was first laid down by a Full Bench of this Court in the celebrated **Rimmalapudi's case** reported in **AIR 1951 Madras 969** [**Rimmalapudi Subba Rao v. Noony Veeraju**]. This principle was approved by the Hon'ble Supreme Court in another celebrated Constitution Bench judgment, being, **Chunilal V. Mehta & Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.**, reported in **AIR 1962 SC 1314**. This continues to be good law until this date. This has been followed as late as 2001 in **Santosh Hazari's case**, reported in **2001 (3) SCC 179** [**Santosh Hazari v. Purushottam Tiwari and others**] and the relevant portions are at paragraph Nos.12 and 14, which reads thus:

'12. The phrase "substantial question of law", as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying question of law, means - of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with - technical, of no



substance or consequence, or academic merely. However, it is clear that the Legislature has chosen not to qualify the scope of substantial question of law by suffixing the words of general importance as has been done in many other provisions such as Section 109 of the Code or Article 133 (1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In *Guran Ditta & Anr. Vs. T. Ram Ditta*, AIR 1928 Privy Council 172, the phrase substantial question of law as it was employed in the last clause of the then existing Section 110 of the C.P.C. (since omitted by the Amendment Act, 1973) came up for consideration and Their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case as between the parties. In *Sir Chunilal V. Mehta & Sons Ltd. Vs. The Century Spinning and Manufacuring Co., Ltd.*, (1962) Supp.3 SCR 549, the Constitution Bench expressed agreement with the following view taken by a Full Bench of Madras High Court in *Rimmalapudi Subba Rao Vs. Noony Veeraju*, ILR 1952 Madras 264:

..when a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative view, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest Court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law.

and laid down the following test as proper test, for determining whether a question of law raised in the case is substantial:

The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those



principles or that the plea raised is palpably absurd the question would not be a substantial question of law.

13. ...

14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstances of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.'

32. The aforesaid principle has been quoted with approval by Supreme Court as late as 3<sup>rd</sup> of October 2016 in **Malan Bi's case**, reported in **2016 (10) SCC 315 [Syeda Rahimunnisa v. Malan Bi]**.

33. Three questions proposed by the appellant / defendant do not qualify as substantial questions of law, when tested on **Rimalapudi** principle as they are neither debatable nor non application of settled law. Besides this, on a careful examination and analysis of the judgments, I am of the view that no other question, which qualifies as substantial question of law, arises in the instant case.

34. In sum and substance, when the questions proposed / propounded by the appellant as protagonist of the second appeal are examined on the **Rimalapudi** principle, it turns out that they do not qualify as substantial questions of law for the purpose of entertaining the appeal under Section 100 CPC, as they are neither debatable nor turn on non application of settled principles of law as alluded to supra.

35. Mr. V. Meenakshi Sundaram, learned Counsel representing the Counsel on record for the caveator points out that the Execution Petition is at an advanced stage, as delivery has been ordered on



23.11.2017 itself as mentioned supra.

36. It was also pointed out by the learned Counsel that the vendor of the plaintiff had put the defendant in juridical possession and it was the plaintiff, who permitted the defendant to stay on for some more time at her request.

37. It was pointed out that it became necessary to file the suit as the defendant did not honour the time frame, for which permission was granted to her and she breached the same.

38. At this juncture Mr.S.Ramakrishnan, learned Counsel for the appellant before this Court, on instructions, submits that the appellant / defendant would vacate the suit property and hand over vacant possession of the same to the respondent / plaintiff within a period of six months from today. Mr.V.Meenakshmi Sundaram, learned Counsel agrees for the proposal.

39. In the light of the consensus arrived at by both the learned Counsel, on the basis of the above submission made by them, on instructions, from their respective clients, the undertaking given by the appellant / defendant is recorded and appellant / defendant is granted time till 31.01.2019 to vacate and hand over the vacant possession of the suit property to the respondent / plaintiff.

40. Until then, the order of delivery made on 23.11.2017 by the Trial Court / Executing Court, ie., Principal District Munsif's Court, Padmanabapuram in E.P.No.7 of 2017, will be kept in abeyance.

41. If for some reason, the appellant / defendant does not vacate and hand over the vacant possession of the suit property to the respondent / plaintiff on or before 31.01.2019, the order of delivery, which is kept in abeyance will be executed within a fortnight therefrom, without further reference to any other proceedings in the Executing Court. This is in addition to other remedies that may be available to the respondent / plaintiff, in the event of breach.

42. The instant Second appeal is disposed of on above terms. Consequently, CMP(MD)No.6198 of 2018 is closed. No orders as to costs.

Sd/-  
Assistant Registrar (CO)

/True Copy/



To

1. The Subordinate Judge,  
Padmanabapuram.

2. The Principal District Munsif,  
Padmanabapuram.

**Copy To:**

The Section Officer,  
VR Section,  
Madurai Bench of Madras High Court,  
Madurai. (2 Copies)

+ 1 CC TO Mr.D.CHRISTENSON JUGUNU, ADVOCATE IN SR No. 75590  
+ 3 CC TO Mr.D.NALLATHAMBI, ADVOCATE IN SR No. 75614

DSK

TE/RP/SAR-4 : 29/08/2018 : 10P/9C

SA (MD) No.234 of 2018  
27.07.2018