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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.04.2019

PRONOUNCED ON : 23.05.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.594 of 2001

and

CMP.No.6223 of 2001

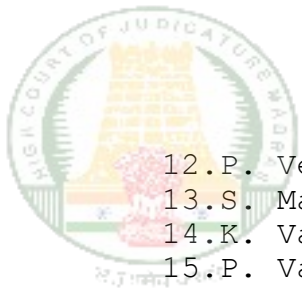
1. Rajagopal (deceased)
2. Kannagambal
3. Balakrishnan
4. Subbarayan
5. Vadivel
6. Padmanabhan
7. Kuppu
8. Manonmani
9. Alamelu
10. Manonmani
11. Minor Padmini
12. Minor Abirami
13. Minor Murugesan
14. Minor Poongavanam
15. Ponunammal
16. Kumar
17. Ramesh
18. Venugopal
19. Chengkani

(Appellants 15 to 19 brought on record as
LRs of the deceased first appellant vide order
of court dated 12.12.2014 made in
CMP.No.949/2011)

... Appellants/Defendants

Vs.

1. Parthasarathy (died)
2. Jayaparvathi
3. Rukmani (Died)
4. Lakshmi
5. Ayyammal
6. Kanniammal
7. Veerasamy
8. Perumal @ Purushothaman
9. Kuppu
10. Perichandra
11. Ponnurangam



12.P. Venkatesan
13.S. Maheswari
14.K. Valarmathi
15.P. Vaijayanthimala

... Respondents/plaintiffs

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(R11 to R15 brought on record as LR's of the deceased R3 vide order of court dated 12.12.2014 made in CMP.Nos.486 to 488/2014)

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 08.12.2000 made in A.S.No.121 of 1999 on the file of the Principal District Judge, Thiruvannamalai reversing the judgment and decree dated 29.07.1999 made in O.S.No.409 of 1987 on the file of the Additional District Munsif No.II, Thiruvannamalai.

For Appellants : M/s. R. Rajarajan

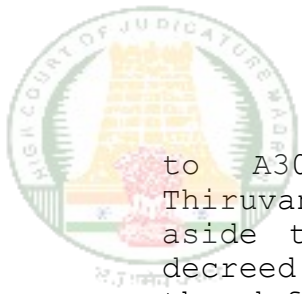
For Respondents : Mr.T.R.Rajaraman (for R2 & R4)

Mr.T.Gandhi (for R5)

Mr.S.Parthasarathy,
Senior Counsel
for M/s.J.Ramakrishnan
(for R6 to R10)

JUDGMENT

This second appeal has been filed by the defendants against the judgment and decree passed by the Principal District Judge, Thiruvannamalai in A.S.No.121 of 1999 dated 08.12.2000 reversing the judgment and decree passed by the Additional District Munsif, No.II, Thiruvannamalai in O.S.No.409 of 1987 dated 29.07.1999. The first respondent herein had filed a suit in O.S.No.409 of 1987 on the file of the Additional District Munsif, No.II, Thiruvannamalai to declare his title over the suit property and to grant a permanent injunction restraining the defendants, their men, etc., from in any manner interfering with his peaceful possession and enjoyment of the suit property. The learned Additional District Munsif No.2, Thiruvannamalai, by the judgment dated 29.07.1999 had dismissed the said suit with costs. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.121 of 1999 on the file of the Principal District Judge, Thiruvannamalai. He also filed an application in I.A.110 of 2010 under Order 41 Rule 27 CPC to receive certain documents as additional evidence. The learned Principal District Judge, Thiruvannamalai by the order and judgment dated 08.12.2000 had allowed the application in I.A.No.110 of 2000 and marked Exs.A16



to A30. Finally the learned Principal District Judge, Thiruvannamalai had allowed the said appeal with costs and set aside the judgment and decree passed by the trial court and decreed the suit as prayed for with costs. Feeling aggrieved, the defendants 3, 6, 10 to 15 and the legal representatives of the fourth defendant have filed the present second appeal.

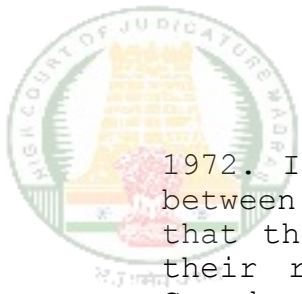
2. For the sake of convenience, the parties are referred to as described before the trial court.

3. The averments made in the plaint are in brief as follows:

The defendants are the paternal uncles of the plaintiff. The plaintiff's father died in the year 1972 and two months thereafter, his mother also died. There has been an oral partition between the plaintiff's father and the defendants long back. The plaintiffs and the defendants are in separate possession and enjoyment of their respective shares and separate pattas also issued. The suit properties originally belonged to one Gulam Khadar Sahib Vagaira. The said property was sold in court auction in O.S.No.623 of 1927 and the same was purchased by the plaintiff's father on 06.03.1929 and he took possession on 03.07.1929. Hence the suit property is a separate and self-acquired property of the plaintiff's father wherein the defendants never claimed any ownership during his life time. In fact, in the oral partition, the suit property was not included and thus the suit property is the separate property of the plaintiff's father. Patta also granted in the name of the plaintiff's father. The plaintiff's father had paid the kists and after his death, the plaintiff is paying the kists to the Government. Further, the plaintiff and his father have been in possession and enjoyment of the suit property continuously without any interruption for more than a statutory period and hence they perfected title by adverse possession also. The plaintiff had mortgaged the suit property in favour of one Panchalaiaammal under a registered deed dated 16.05.1972. The Social Welfare Department of Government of Tamilnadu had acquired 3 acres out of 5.97 acres purchased by the plaintiff's father and the suit property alone remains with the plaintiff. The fact remains so, the defendants due to enmity, during December, 1986, attempted to give trouble to the plaintiff. Hence the plaintiff had issued a lawyer's notice dated 06.12.1986 and after receipt of the said notice, the defendants had sent a reply with false averments. Even thereafter, they attempted to trespass into the suit property and hence, the plaintiff was constrained to file the above suit for declaration and for permanent injunction.

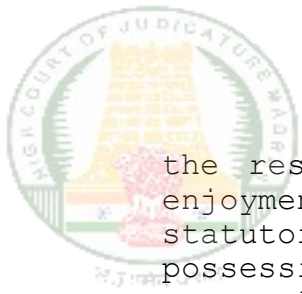
4. The averments made in the written statement are in brief as follows:

a) It is true that the plaintiff's father died in the year



1972. It is false to state that there had been oral partition between the plaintiff and defendants several decades back and that the defendants are in separate possession and enjoyment of their respective shares. The plaintiff's father viz., Perumal Gounder and Mannangatti are the sons of one Veerasami Gounder. The said Veerasami Gounder and his three sons had constituted an undivided Hindu Joint family. In the partition which took place between Veerasami Gounder and his brothers Chinnakutti and Ramasami Gounder, 8 acres of ancestral lands with 4 wells were allotted to the share of Veerasami Gounder. From and out of the income derived from the said ancestral lands, Veerasami Gounder purchased about 2.50 acres from his brother Chinnakutti Gounder. The said Veerasami Gounder became old and hence in the year 1925, his eldest son viz., Perumal Gounder became the Manager of the joint family and at that time, the defendants were minors. From and out of the income derived from the ancestral joint family property, Perumal Gounder in his capacity as manager of the said joint family purchased the suit property bearing S.No.6/3 measuring 5.97 acres in the court action sale in O.S.No.623 of 1927 on the file of the District Munsif, Thiruvannamalai for a sum of Rs.575/- for the benefit of all the members of the joint family. Therefore, the suit property was not at all self-acquired property of Perumal Gounder and he never exclusively enjoyed the suit property and asserted any exclusive title over the suit property. Further in his capacity as manager of the joint family, he also purchased 1.95 acres out of 7.65 acres in S.No.45/2 for a sum of Rs.100/- under a registered sale deed dated 09.04.1935. In the very same Survey Number, the said Veerasami Gounder while he was the manager had purchased 1.95 acres from one Sarambi. Thus in S.45/2, out of the 7.65 acres, the joint family got 3.90 acres. The plea of acquisition of title by Perumal Gounder by adverse possession is false and misconceived. In or about 1940, Perumal Gounder, Mannangatti Gounder, Gopalasamy Gounder and their father, Veerasami Gounder orally partitioned all their ancestral and joint family properties including the suit property.

b) In the said partition, Veerasami Gounder did not take any share for himself. The suit property had been divided into three shares and western most 1.99 acre in S.No.6/5 had been allotted to the share of Perumal Gounder, the middle 1.99 acre had been allotted to the first defendant and the eastern most 1.99 acre had been allotted to the share of the second defendant. Eversince the date of partition, the respective sharers have been enjoying their respective shares. Likewise property measuring 3.90 acres situated in S.No.45/2 also divided into three equal shares between the brothers. The second defendant mortgaged his share in the suit property in favour of Meenakshi Ammal, for Rs.1000/- under a registered mortgage deed dated 01.02.1952 and discharged the said deed partially in 1962 and



the rest in 1965. The defendants have been in possession and enjoyment of their respective shares for more than several statutory periods and thereby perfected their title by adverse possession. The Social Welfare Department of Tamilnadu sent a proposal notice for acquisition of the land to the plaintiff by mistake. The defendants came to know about the proposed acquisition by the Government and hence, they raised objection for sending notice to the plaintiffs alone. Thereupon the Tahsildar came to the suit village and held an enquiry by himself and set aside the suit land belonging to the plaintiffs and the defendants and hence he subsequently, sent a notice to both the parties. The patta in the suit land was wrongly issued for the plaintiff and on coming to know about the fact that the defendants filed an objection before the Tahsildar and an appeal before the Revenue Divisional Officer and the Tahsildar after having held detailed enquiry granted a joint patta for the suit property in the names of the plaintiff and the defendants. The suit is also bad for non-joinder of necessary parties. The plaintiff has to file a suit for partition to workout his share and the present suit is not maintainable and hence they prayed to dismiss the suit.

5. The averments made in the written statement filed by the eighth defendant are in brief as follows:

Manangatti Gounder is entitled to 1/3rd share in the suit property. He died intestate leaving behind two sons and four daughters viz., the defendants 3, 4, 5 to 8. Manangatti Gounder wife predeceased him. He in other aspects adopts, the written statement filed by the first defendant.

6. Based on the aforesaid pleadings, the learned Additional District Munsif, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and he also marked Ex.A1 to A15 as exhibits. On the side of the defendants, the third defendant was examined as DW1, and two more witnesses were examined as DW2 and DW3. They also marked Exs.B8 to B15 as exhibits.

7. The learned Additional District Munsif, Thiruvannamalai, after considering the materials placed before him, found that the suit property was purchased by the plaintiff's father from and out of the joint family property for the benefit of the entire joint family. He further found that since the suit property is the joint family property, the plaintiff cannot claim absolute right over the suit property. Accordingly, he dismissed the suit with costs. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.121 of 1999 on the file of the Principal District Judge, Thiruvannamalai. He also filed an application in I.A.No.110 of 2000 to receive certain documents as Additional documentary evidence. The learned



Principal District Judge, Thiruvannamala, by the order and judgment dated 08.12.2000 had allowed the said application and marked Exs. A16 to 30 and finally allowed the said appeal and set aside the judgment and decree passed by the trial court and decreed the suit as prayed for with costs. Aggrieved by the same, the defendants 3, 6, 10 to 15 and the legal representatives of the deceased fourth defendant have filed the present second appeal.

8. This court at the time of admitting the second appeal has formulated the following substantial question of law:

" Whether the learned District Judge is right in shifting the entire burden on the shoulders of the defendants to prove that the property belonged to joint family?"

9. Heard Mr. R. Rajarajan, learned counsel for the appellants and Mr.T.R.Rajaraman, learned counsel for the respondents 2 & 4, Mr.T.Gandhi, learned counsel for the fifth respondent and Mr.S.Parthasarathy, learned counsel for the respondents 6 to 10.

10. Substantial question of law:

In this case, the trial court had dismissed the plaintiff's suit. As against the judgment and decree of the trial court, the plaintiff had filed an appeal in A.S.No.121 of 1999 on the file of the Principal District Judge, Thiruvannamalai. He also filed an application in I.A.No.110 of 2000 under Order 41 Rule 27 CPC seeking permission of the appellate court to receive kist receipts, adangal extracts and encumbrance certificate to show that the suit property is a self-acquired property of his father Perumal Gounder. It is seen from the judgment of the first appellate court that the said application has been contested by the defendants by filing counter. However, the first appellate court not only allowed the said application but also marked the documents as Exs.A16 to A30 without following the procedure prescribed under Order 41 Rule 28 CPC.

11. In this context, it would be relevant to refer to the decision in K.M. Thangavel and others Vs. K.T. Udayakumar and another 2014 (2) CTC 113 (Mad) wherein this court in paragraph No.24 has observed as follows:

"24. However, after taking a decision to allow those two applications, namely I.A.Nos.113/2011 and 435/2011, the learned lower appellate judge has not chosen to follow the procedure prescribed in the Civil Procedure Code for recording of additional evidence and the lower appellate judge simply marked those documents as Exs.A10 and A11 and B13 and B14 respectively and proceeded with the pronouncement of



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judgment. The said procedure adopted by the learned lower appellate judge is not in conformity with the scheme provided in the Code of Civil Procedure for recording of additional evidence in the appellate stage. While dealing with the application seeking permission to adduce additional evidence in the appellate stage, the appellate court has to hear the application along with the appeal. But it does not mean that no separate order can be passed or is desirable after such hearing. In case the appellate court comes to the conclusion that the application cannot be allowed and the same deserves to be dismissed, there would not be any impediment for incorporating the said order in the Judgment itself and proceed with the pronouncement of judgment. On the other hand, if the appellate court decides to allow the application seeking permission to adduce additional evidence, a separate order allowing the petition shall be passed and the order shall indicate the points regarding which the additional evidence is to be adduced. Such additional evidence can be taken either by the appellate court or the appellate court can direct the trial court or any court subordinate to it to record such evidence and transmit the same to the appellate court. The same shall be clear from the provisions found in Order 41 Rule 28, which reads as follows: 28. Mode of taking additional evidence - Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court. A reading of the same will show that, in case the appellate court comes to the conclusion that a party to the appeal should be permitted to adduce additional evidence, then there shall be a separate order in the application, which should be followed by recording of evidence. Only thereafter the appellate court can proceed with the pronouncement or judgment in appeal, taking into account the entire evidence including the additional evidence adduced in the appellate stage."

12. From the aforesaid decision, it is clear that where an application under Order 41 Rule 27 CPC is filed seeking permission of the appellate court to adduce additional evidence, the appellate court has to hear the said application along with the appeal, but it does not mean that no separate order can be passed or is desirable after such hearing. In case the



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Appellate Court comes to the conclusion that the application cannot be allowed and the same deserves to be dismissed, there would not be any impediment for incorporating the said order in the judgment itself and proceed with the pronouncement of judgment. On the other hand, if the appellate court decides to allow the application seeking permission to adduce additional evidence, a separate order allowing the said application shall be passed and the order shall indicate the points regarding which the additional evidence is to be adduced. It is also clear that in view of the provisions of Order 41 Rule 28 CPC, such additional evidence can be taken either by the appellate court or the appellate court can direct the trial court or any court subordinate to it to record such evidence and transmit the same to the appellate court. Only thereafter, the appellate court can proceed with the pronouncement or judgment in appeal, taking into account the entire evidence including the additional evidence adduced in the appellate stage. In this case, the learned appellate court Judge heard the application which was filed under Order 41 Rule 27 CPC to adduce additional evidence along with the main appeal and allowed the said application, marked the documents as exhibits directly in the judgment itself. In view of the aforesaid decision, if the appellate court decides to allow the said application, a separate order should have been passed and thereafter the procedure laid down under Order 4 Rule 28 CPC should have been followed, but in this case as already pointed out that the appellate court had allowed the said application by incorporating the said order in the judgment itself and proceeded with the appeal and pronounced judgment after marking as many as 15 documents as Exs. A16 to A30. Therefore, it is clear that the procedure adopted by the first appellate Judge is not in conformity with the scheme provided in the Code of Civil Procedure for recording additional evidence in the appellate stage.

13. It is also relevant to refer to the recent decision of the Hon'ble Supreme Court in Corporation of Madras and another Vs. M.Parthasarathy and others 2018 (9) SCC 445, wherein the Hon'ble Supreme Court in paragraph Nos.11 to 19 has observed as follows:

"11) Heard Mr. R. Basant, learned senior counsel for the appellants and Ms. Aruna Prakash, learned counsel for the respondents.

12) Having heard the learned counsel for the parties and on perusal of the written submissions filed by the learned counsel for the respondents, we are of the considered view that these appeals deserve to be allowed in part on a short ground as indicated infra.

13) It is an admitted fact that the respondents (plaintiffs) had filed an application under Order



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41 Rule 27 of the Code in their first appeals before the first Appellate Court (CMP No.1559/93) praying therein for production of additional evidence in appeals. It is also an admitted fact that this application was allowed and the additional evidence was not only taken on record but also relied on by the Appellate Court as Exs.P?16 to P?20 for allowing the appeals filed by the respondents which, in consequence, resulted in decreeing all the four civil suits.

14) In our considered opinion, the first Appellate Court committed two jurisdictional errors in allowing the appeals.

15) First, it took into consideration the additional piece of evidence while deciding the appeals on merits without affording any opportunity to the appellants herein (who were respondents in the first appeals) to file any rebuttal evidence to counter the additional evidence adduced by the respondents (appellants before the first Appellate Court). This caused prejudice to the appellants herein because they suffered the adverse order from the Appellate Court on the basis of additional evidence adduced by the respondents for the first time in appeal against them. (See Land Acquisition Officer, City Improvement Trust Board vs. H. Narayanaiah & Ors., (1976) 4 SCC 9, Shalimar Chemical Works Ltd. vs. Surendra Oil & Dal Mills (Refineries) & Ors., (2010) 8 SCC 423 and Akhilesh Singh vs. Lal Babu Singh & Ors., (2018) 4 SCC 759).

16) Second error was of a procedure which the first Appellate Court failed to resort in disposing of the appeals. This also involved a question of jurisdiction.

17) Having allowed the CMP No.1559/1993 and, in our opinion rightly, the first Appellate Court had two options, first it could have either set aside the entire judgment/decreed of the Trial Court by taking recourse to the provisions of Order 41 Rule 23?A of the Code and remanded the case to the Trial Court for re?trial in the suits so as to enable the parties to adduce oral evidence to prove the additional evidence in accordance with law or second, it had an option to invoke powers under Order 41 Rule 25 of the Code by retaining the appeals to itself and remitting the case to the Trial Court for limited trial on particular issues arising in the case in the light of additional evidence which was taken on record and invite findings of the Trial Court on such limited issues



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to enable the first Appellate Court to decide the appeals on merits.

18) The first Appellate Court failed to take note of both the above mentioned provisions and proceeded to allow it wrongly.

19) Due to these two jurisdictional errors committed by the first Appellate Court causing prejudice to the appellants herein while opposing the first appeals, the judgment rendered by the first Appellate Court, in our opinion, cannot be sustained legally on merits.

20) The High Court also while deciding the second appeals failed to notice these two jurisdictional legal errors which went to the root of the case. It is for this reason, the impugned order also cannot be legally sustained calling interference by this Court.

21) In the light of the foregoing discussion and having regard to the totality of the facts of the case and to enable the parties to have full and fair trial, we consider it proper to take recourse to the powers under Order 41 Rule 23A of the Code and accordingly set aside the judgment and decree of the first Appellate Court to the extent it allows the respondents appeals on merit but at the same time uphold that part of the order which has allowed CMP No.1559/1993 filed by the plaintiffs for adducing additional evidence and remand the cases to the Trial Court for re-trial of all the four civil suits on merits afresh. "

14. In this case also, the first appellate court after allowing the application filed by the appellants/plaintiffs under Order 41 Rule 27 CPC, the additional evidence was taken on record. Further, it also relied upon the said documents and allowed the appeal. In view of the aforesaid decision of the Hon'ble Supreme court also, the procedure followed by the first appellate court is totally against the provisions of Order 41 Rule 28 CPC. Hence, following the aforesaid decision, this court is inclined to allow the second appeal and remit the matter to the first appellate court to record the evidence by following the procedure prescribed under Order 41 Rule 28 CPC and thereafter an opportunity should be given to the defendants to let in rebuttal evidence and only thereafter, the appeal has to be disposed of in accordance with law.

15. In the result, the second appeal is allowed. Consequently, connected miscellaneous petitions are closed. The judgment and decree passed by the first appellate court are set aside. The



matter is remitted back to the first appellate court. The first appellate court is directed to record the evidence by following the procedure prescribed under Order 41 Rule 28 CPC. Further, it is directed that the first appellate court has to give an opportunity to the defendants to let in rebuttal evidence and thereafter dispose of the appeal in accordance with law within three months from the date of receipt of a copy of this judgment. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

Gv

To

1. The Principal District Judge,
Thiruvannamalai.
2. The Additional District Munsif No.II,
Thiruvannamalai.
3. The Section Officer,
VR Section,
High Court, Madras.

S.A.No.594 of 2001
and
CMP.No.6223 of 2001

AD(CO)
GN(16/10/2019)