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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 19.03.2019

PRONOUNCED ON: 30.07.2019

CORAM

THE HONOURABLE MRS. JUSTICE J.NISHA BANU

SECOND APPEAL (MD) No.247 of 2017

and

C.M.P. (MD) .Nos.5222 of 2017 and 6744 of 2018

Duraisamy

... Appellant /
Respondent / Plaintiff

Vs.

1.Chinnaiah Gounder

... 1st respondent/
Appellant/1st defendant

2.Palani Gounder

3.Chinnaiah Konar

... Respondents 2 & 3/
Respondents 2 & 3 /Defendants 2 & 3

(Respondents 2 and 3 were set *ex parte* before the both the Courts below and therefore, they are given up in this appeal as well)

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated 08.03.2017, passed in A.S.No.17 of 2013 by the Principal District Judge, Pudukkottai, reversing the judgment and decree, dated 24.09.2010 passed in O.S.No.33 of 2003 by the District Munsif cum Judicial Magistrate, Keeranur.

For appellant

... Mr.N.Balakrishnan

For 1st respondent

... Mr.K.Balasundaram,
for M/s.R.Karthika

JUDGMENT

This second appeal has been filed by the appellant/plaintiff challenging the judgment and decree, dated 08.03.2017, passed by the first appellate Court in A.S.No.17 of 2013, reversing the judgment and decree passed in O.S.No.33 of 2003.

2. The appellant / plaintiff filed the suit in O.S.No.33 of 2003 for permanent injunction restraining the defendants from interfering with his peaceful possession and enjoyment of the suit property. According to the appellant/plaintiff, the suit property was allotted to him through partition in the year 1985 and there is a public cart track passes through the eastern side of the suit property and the same is in existence from time immemorial. The defendants 1 and 2 obliterated the said passage and encroached the same unlawfully and now attempted to form a new road through the suit land and hence, he filed the suit. According to the first respondent/first defendant, a north-south pathway has been in existence from time immemorial on the eastern side land of the plaintiff and on the western side land of the first defendant.



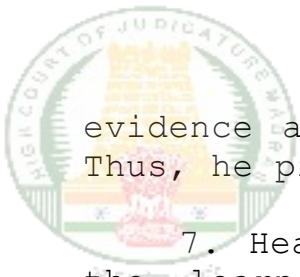
In the sale deed of the first defendant, the public pathway is clearly mentioned. Since the disputed portion is a public pathway being enjoyed by the general public from time immemorial, the plaintiff is not entitled to the relief. The defendants 2 to 4 remained *ex parte* before the trial Court.

3. In order to establish the case, on the side of plaintiff, the plaintiff himself was examine as PW1 and Exs.A1 to A7 were marked. On the side of the contesting defendant, the first defendant himself was examined as DW1 and the two other witnesses were examined as DW2 and DW3, however, no documentary evidence was marked. On the side of the Court, the Advocate Commissioner's report and plan are marked as Exs.C1 and C2.

4. The trial Court, after trial, has decreed the suit holding that as per Exs.A2, A3 and A7 and the report of the Advocate Commissioner, there is no public pathway is in existence in the suit property. Aggrieved by the same, the first respondent/ first defendant filed appeal in A.S.No.17 of 2013. The first appellate Court, by judgment dated 08.03.2017, reversed the finding of the trial Court mainly relying upon the additional documents filed by the first respondent/first defendant, thereby allowed the appeal and dismissed the suit. Aggrieved by the same, the appellant/plaintiff filed this second appeal.

5. The learned counsel appearing for the appellant/plaintiff mainly contended that the first appellate Court has allowed the appeal only based on the additional documents leisurely filed by the first respondent/first defendant in I.A.No.32 of 2016. The appellant/plaintiff did not admit those documents nor given consent for marking those documents. The first appellate Court ought to have marked those documents after providing an opportunity to the appellant/plaintiff herein. As the first appellate Court has marked the additional documents without following the procedure contemplated under Order 41 Rules 27 and 28 C.P.C. and decided the appeal, this Court may set aside the judgment and decree passed by the first appellate Court and remit the same to decide the appeal after marking of the documents by following the procedure contemplated under Order 41 Rules 27 and 28 C.P.C. Thus, he prayed to allow this appeal.

6. The learned counsel appearing for the first respondent/first defendant submitted that the appellant/plaintiff had filed a counter affidavit as against the application filed for receiving additional documents and therefore, it cannot be contended that he has not been provided any opportunity. He would further submit that the provision for recording reasons mentioned in Order 41 Rule 27 of C.P.C. is only directory and not mandatory, <https://hccivils.courts.gov.in/services/> on to record reasons for allowing additional evidence does not vitiate such admission. Therefore, the first appellate Court has rightly allowed the application for additional



evidence and the appeal. The same need not be interfered with. Thus, he prayed to dismiss this appeal.

7. Heard the learned counsel for the appellant/plaintiff and the learned counsel appearing for the first respondent/first defendant.

8. At the time of admission, this Court admitted this appeal on the following substantial questions of law:

"a) Whether the judgment and decree of the Lower Appellate Court in allowing the appeal on the basis of Ex.B1, Sale Deed, suo-motu marked by the Lower Appellate Court without examination of 1st respondent in proof of it is tainted with illegality and therefore, liable to be set aside?

b) Whether the finding of the Lower Appellate Court that the very suit for the injunction without relief of declaration is unsustainable in law and further such a finding is unwarranted, when the title of appellant/plaintiff over the suit property is not in dispute?

c) Whether the Lower Appellate Court is correct in casting the negative burden of proving that the first respondent has no right of passage through suit property is on the appellant/plaintiff is perverse and vitiated by non-consideration of material evidence on record both oral and documentary?"

9. The core question to be decided in this appeal is as to whether the procedure prescribed in the Civil Procedure Code for recording of additional was followed by the first appellate Court or not?.

10. Before going into the above issue, this Court is inclined to refer to the decision of this Court in **K.M.Thangavel and others Vs. K.T.Udayakumar and another**, reported in **2014 (2) CTC 113**, wherein a learned single Judge has held in paragraph Nos.24 and 25 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 & A11 and B13 & B14 respectively and proceeded with the pronouncement of 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 of judgment in Appeal, taking into account the entire evidence including the additional evidence adduced in the Appellate Stage.

25. The above said procedure is not without any exception. There is one exception for the proposition that in cases wherein the Appellate Court grants permission to a party to adduce additional evidence, there must be a separate order on the Application filed under Order 41



Rule 27, which should be followed by recording of evidence. The exceptional case is where the parties to the Appeal concede the prayer of the other side for adducing additional evidence and also give their consent for marking those documents as additional exhibits. Even in cases wherein the Application under Order 41 Rule 27 would have been resisted initially, on the expression of the view of the Court that such an Application deserves to be allowed, if the opposite parties may give their consent for the marking of those documents, there would not be any need to adduce oral evidence for the proof of the documents. In such cases alone, the Appellate Court can incorporate an order allowing the Application and also mark the documents by consent and proceed with the pronouncement of the judgment in the Appeal."

(emphasis supplied)

11. In similar circumstances, the Hon'ble Supreme Court in the decision in **Akhilesh Singh @ Akhileshwar Singh Vs. Lal Babu Singh and others**, reported in **(2018) 4 SCC 659** has held in paragraph Nos.

14.A three-Judge Bench of this Court in **Land Acquisition Officer, City Improvement Trust Board Vs. H. Narayanaiah & Ors.**, (1976) 4 SCC 9 had occasion to consider Order LXI Rule 27 in context of admission of additional evidence by Appellate Court. This Court had observed that in event the High Court admits an additional evidence, an opportunity should have been given to the other party to rebut any inference arising from its existence by leading evidence. In Para 28 of the judgment, following has been laid down:-

"28. The Karnataka High Court had, however, not complied with provisions of Order 41 Rule 27 of the CPC which require that an appellate court should be satisfied that the additional evidence is required to enable it either to pronounce judgment or for any other substantial cause. It had recorded no reasons to show that it had considered the requirements of Rule 27 Order 41 of the CPC. We are of opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason and if it found it necessary to admit it, an opportunity should have been given to the appellant to rebut any inference arising from its existence by leading other evidence." (emphasis supplied by us)



18. The judgment and order dated 25-4-2003 passed by the Division Bench is set aside and the matter is remitted to the learned Single Judge to proceed in the appeal from the stage the originals



of the registration certificates were taken on record as additional evidence. The learned Single Judge may allow the respondent-defendants to lead any rebuttal evidence or make a limited remand as provided under Order 41 Rule 28."

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16. The submission of the learned counsel for the respondents that execution of sale deeds was never denied by the present appellant before the High Court, hence no error has been committed by the High Court in relying on the contents in the sale deed cannot be accepted. Even if, execution of sale deeds was not denied, the Appellate Court before which any statement in sale deeds is relied ought to have given an opportunity to lead evidence in rebuttal or to explain the admission. Opportunity to explain the admission contained in the sale deeds was necessary to be given to the contesting party in the facts of the present case. We thus are of the opinion that the High Court erred in simultaneously proceeding with the hearing of the appeal after admitting additional evidence on record. The High Court ought to have given opportunity to contesting respondents in the First Appeal to lead evidence in rebuttal or to explain the alleged admission as contained in the sale deed, which having not been done, the order and judgment of the High Court deserves to be set aside. The High Court may now proceed to decide the appeal afresh after giving an opportunity to the present appellant to lead evidence in rebuttal. The appeal before the High Court being pending since 1976, we expect that the High Court should conclude the entire process expeditiously preferably within a period of six months from the date of production of this judgment before the High Court. We make it clear that we have not expressed any opinion on merits of the case and it is for the High Court to consider the First Appeal on merits afresh and take a decision in accordance with law. In result, this appeal is allowed, judgment and decree of the High Court is set aside. The First Appeal be decided by the High Court afresh as observed above. Parties shall bear their own costs.

12. In yet another decision in **Corporation of Madras and another Vs. M. Parthasarathy and others**, reported in 2018 (3) MWN (Civil) 781, the Hon'ble Supreme Court has held in paragraph No. 13 to 19 as follows:

"13) It is an admitted fact that the



respondents (plaintiffs) had filed an application under Order 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.P16 to P20 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 23A of the Code and remanded the case to the Trial Court for retrial 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 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.

13. The above decisions make it clear that though the application for additional evidence filed under Order 41 Rule 27 C.P.C. at the appellate stage can be heard together with the appeal, in case of allowing the application for additional evidence, the Appellate Court has to pass separate order in the application indicating the points regarding which the additional evidence is to be adduced. Such additional evidence can be taken either by the Appellate Court itself or the Appellate Court can direct the Trial Court or any other Court Subordinate to it to record such evidence and transmit the same to the appellate Court. The said exercise will give an opportunity to the other party to lead evidence in rebuttal.

14. Admittedly, in this case, the respondent/defendant filed application for additional evidence before the first appellate Court and the first appellate Court heard both the appeal as well as the application for additional evidence together and allowed the application for additional evidence and pronounced the judgment not only taking on record the additional evidence as Exs.B1 and B2 but also relying on the same for allowing the appeal filed by the respondent/defendant, which, in consequence, resulted in dismissing the suit.

15. A perusal of the record shows that the first appellate Court has marked the additional documents without following the procedure contemplated under Order 41 Rules 27 and 28 of C.P.C. and without providing an opportunity to the appellant/plaintiff to lead evidence in rebuttal. The first appellate Court ought to have given an opportunity to the appellant/plaintiff in the first appeal to lead evidence in rebuttal. Therefore, this Court is inclined to set aside the judgment passed by the first appellate Court and remit the same.

16. As the first appellate Court has reversed the judgment of the trial Court mainly relying on the additional evidence and only the procedure for admitting such evidence is in lacuna, this Court does not deal with the merits of the other contentions and



it is always left open to the parties to agitate the same before the first appellate Court.

17. In the result, this second appeal is allowed and the judgment and decree passed by the first appellate Court is set aside and the same is remitted to the file of the first appellate Court to decide the appeal afresh after giving an opportunity to the appellant/plaintiff to lead evidence in rebuttal and following the procedure contemplated under the Civil Procedure Code. Considering the year of the suit, the first appellate Court is directed to dispose of the appeal on merits and in accordance with law within a period of three months from the date of receipt of a copy of this judgment. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

Sub Assistant Registrar (CS)

To

1. The Principal District Judge, Pudukkottai.

2. The District Munsif cum Judicial Magistrate,
Keeranur.

3. The Record Keeper, -2 copies
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.R.KARTHIKA, Advocate (SR-78434[F] dated 30/07/2019)

+1 CC to M/s.N.BALAKRISHNAN, Advocate (SR-78912[F] dated
31/07/2019)

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judgment in
S.A. (MD) No.247 of 2017
30.07.2019

KM/(16.09.2019) 10P 7C