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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.07.2019

CORAM:

THE HONOURABLE **MR. JUSTICE S.S.SUNDAR**

S.A. (MD) No.253 of 2017

and

C.M.P. (MD) Nos.5465 of 2017 and 11885 of 2018

1.Muthaiah Konar  
2.Veeralatchimi  
3.K.Subbiah

... Appellants/Appellants/  
Plaintiffs

Vs.

1.Masilamani  
2.Michael

... Respondents/Respondents/  
Defendants

Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree in A.S.No.58 of 2014, dated 14.02.2017 passed by the Subordinate Judge, Sankarankovil, confirming the judgment and decree of the Principal District Munsif, Sankarankovil, dated 27.06.2014 in O.S.No.182 of 2013.

For Appellants : Mr.F.X.Eugene  
R1 : Given up  
For R2 : Mr.R.J.Karthick

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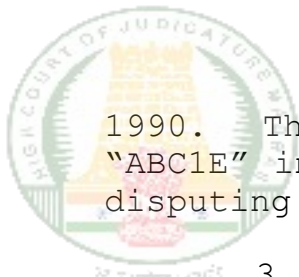
### **JUDGMENT**

This second appeal is preferred by the plaintiffs in the suit in O.S.No.182 of 2013 on the file of the Principal District Munsif Court, Sankarankovil.

2.The appellants filed the suit in O.S.No.182 of 2013 for declaration of their title in respect of suit third schedule property and restraining the defendants from interfering with their right to use the suit third schedule property to have access to their property, which are described as suit schedule property 4, 5 and 6.

3.The case of the appellants in the plaint are as follows:

3.1.The property measuring to an extent of 19¾ cents, which is on the western side of S.No.467 (total extent is 99 cents) is the ancestral property of the first defendant. In 1987, the first defendant sold the suit first schedule property in favour of the second defendant orally. Out of the property purchased by the second defendant from the first defendant, the second defendant sold 14½ cents in favour of the first plaintiff orally in the year



1990. The property purchased by the first plaintiff is shown as "ABC1E" in plaint plan and hence, the defendants are estopped from disputing the oral sale in favour of the first plaintiff.

3.2. The property, that was shown as suit third schedule, was reserved for the plaintiffs to use this as pathway to have access to the main road on the southern side of the entire property. Similarly, the first plaintiff and other plaintiffs are using the suit third schedule property for their enjoyment over the entire second schedule property. Since the suit third schedule property is used by the plaintiffs for their beneficial enjoyment of the suit second schedule property for few decades, the first plaintiff has also prescribed title to the third schedule property by adverse possession.

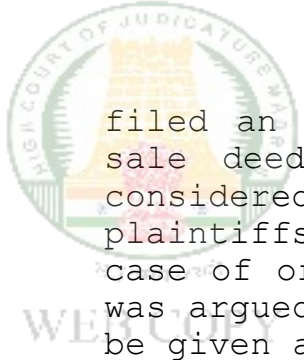
3.3. Though the plaintiffs/appellants claim title to the property and the suit was also for declaration of title of first plaintiff, in respect of suit third schedule property, the plaintiffs also pleaded that the suit third schedule property is the only pathway to have access for their lands from the main road.

3.4. The second defendant contested the suit by filing a detailed written statement. In the written statement, the averments made in the plaint are specifically denied. The second defendant questioned the validity of the oral sale apart from disputing the title and enjoyment of the first plaintiff over the suit third schedule property by referring to his possession and enjoyment. As a matter of fact, the second defendant pleaded that he purchased the entire first schedule property by virtue of a registered sale deed, dated 11.12.2009.

3.5. It appears that the documents filed on behalf of the plaintiffs are marked through third plaintiff, who was examined as PW-1. When the case was posted for cross examination of PW-1, the second defendant or his Counsel did not appear. Hence, the second defendant was set *ex parte* and the evidence was also closed. Thereafter, the trial Court posted the case for judgment and pronounced the judgment on merits. The trial Court, after framing necessary issues, found that the plaintiffs are not enjoying the suit third schedule pathway, as alleged and that the plaintiffs are not entitled to get declaration of title of suit third schedule pathway as prayed for. The trial Court also posed a question whether the plaintiffs are entitled to an order of injunction by accepting their case that the property is also used as a pathway to have access to their property from the main road. In view of the fact that the plaintiffs have failed to prove their title and enjoyment, the trial Court refused to grant the relief of injunction. Aggrieved by the same, the plaintiffs preferred an appeal in A.S.No.58 of 2014 on the file of the Subordinate Court, Sankarankovil.

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

3.6. During the pendency of the appeal, the second defendant



filed an application in I.A.No.16 of 2015 to mark the registered sale deed, dated 11.12.2009. However, the said application was considered and dismissed along with the appeal filed by the plaintiffs. The lower Appellate Court also refused to accept the case of oral sale pleaded by the appellants/plaintiffs. Though it was argued before the lower Appellate Court that the appellants may be given an opportunity and the matter may be remitted to the trial Court, the lower Appellate Court considered the said plea and found that the appellants have never made an attempt to seek permission to lead further evidence or justifying their stand seeking remand.

3.7.The lower Appellate Court, after considering the entire evidence, found that the appellants/plaintiffs have not proved their right or title or exclusive enjoyment over the suit third schedule property, in view of the legal position that the oral sale is not valid and the second defendant's title earlier is admitted. The lower Appellate Court confirmed the judgment and decree of the trial Court, after elaborately discussing the entire evidence and the pleadings on both sides. Aggrieved by the concurrent findings of the Courts below, the above second appeal has been preferred by the plaintiffs.

4.In the memorandum of grounds, the following substantial questions of law have been raised by the appellants:

*"1.Whether the Lower Courts are correct in holding a legal position that before the plaintiffs' witnesses are not cross examined by the defendants' side and if the defendants' side did not proceed with the case, and set ex parte by the Court, a "verdict judgment", as contemplated under C.P.C. could be passed and whether the same judgment is valid under law?*

*2.Whether Lower Courts are correct in holding that, when there is only oral sale is pleaded and the possession in consequence of the same oral sale is admitted by facts, if with respect to a major portion of the same oral sale, possession is with the purchaser, with respect to a limited connected portion also whether a presumption could not be invoked and whether is hit by Section 17 of the Registration Act?*

*3.Whether the Lower Courts are correct in holding that the declaratory relief could not be granted blindly, since there is no registered sales deed with respect to the third schedule property, even though the possessory title of other properties are not denied by the defendants?*

*4.Whether the Lower Courts are correct in holding, when the first defendant, who was the original owner of the entire first schedule property, did not deny the title of the second defendant, who was the original owner of the third schedule property either in the pleadings, as written statement or coming onto the box as witness, to disprove the plaintiffs' pleadings?"*

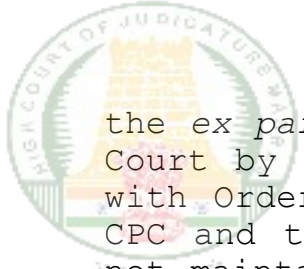


5.The learned Counsel for the appellants submitted that the trial Court erred in rendering a "verdict judgment", despite the fact that the second defendant was set *ex parte* and did not appear, when the suit was listed for trial. He further contended that as per order 17 Rule 2 and 3 CPC, the Court has no other option, but to dispose of the suit as provided under Order 9 CPC. Since the trial Court has dismissed the suit on merits, it is contended that the judgment of trial Court is vitiated for not disposing of the suit in the manner as provided under Order 9 CPC. The learned Counsel further submitted that the oral sale pleaded by the plaintiffs cannot be resisted, as the defendants themselves have not claimed any right or title to the property by any registered sale. He also pointed out that the Courts below ought to have granted the declaratory relief in favour of the plaintiffs/appellants in respect of the suit third schedule property, as possessory title of the first plaintiff over the suit third schedule property is not disputed by the defendants. He further stated that since the first defendant, who was the original owner of the suit property, did not deny the title of the first plaintiff over the suit third schedule property, either by way of reply or by examining himself in the witness box, the lower Court ought to have decreed the suit as prayed for.

6.As against the submission of the learned Counsel for the appellants, Mr.R.J.Karthick, learned Counsel for the second respondent submitted that the plaintiffs' claim of title is based on oral sale from the second defendant and that the Courts below, on proper appreciation of evidence referred to, grant the decree of declaration of title and permanent injunction based on oral sale, which is disputed. The learned Counsel further pointed out that the plaintiffs, who have not pleaded any esement right, are not entitled to get declaration of title and consequential injunction by pleading that the suit third schedule property is required for their convenient enjoyment of the property by having access from their property to the main road. Since the plaintiffs have not proved their possession nor adverse possession, the learned Counsel further submitted that the appeal is liable to be dismissed.

7.The learned Counsel also relied upon the judgment of Honourable Supreme Court for the proposition that the plaintiffs are not entitled to claim title by adverse possession.

8.The learned Counsel for the appellants relied upon a judgment of Honourable Supreme Court in the case of **Prakash Chander Manchanda and another vs Smt.Janki Manchanda**, reported in **AIR 1987 SC 42**. Before the Honourable Supreme Court, the appellants are the defendants in the suit. Since the defendants are not ready, despite the matter is being adjourned on several occasions, the suit was postponed for arguments. Subsequently, judgment was pronounced on merits. The appellants before the Honourable Supreme Court filed an application under Order 9 Rule 13 CPC to set side

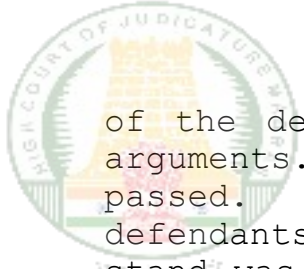


the *ex parte* decree. The said petition was dismissed by the trial Court by holding that the case was disposed of not in accordance with Order 17 Rule 2 CPC, but in accordance with Order 17 Rule 3 CPC and therefore, the application under Order 9 Rule 13 CPC was not maintainable. Thereafter, the review application filed by the appellants was also dismissed. The first appeal filed before the High Court was also dismissed. On appeal before the Honourable Supreme Court, the Honourable Supreme Court held that Order 17 Rule 3 as it stands cannot be applicable to the facts of the case, as admittedly on the date, when the evidence of defendants was closed, nobody appeared for the defendant. Having regard to the facts and circumstances, it was held that the trial Court ought to have decreed the suit *ex parte* and that the decision though was on merits, the defendant is entitled to file an application under Order 9 Rule 13 CPC treating it as an *ex parte* decree.

9. The Law that was actually settled by the Honourable Supreme Court in the above judgment cannot be doubted. But the defendant was set *ex parte* and was absent when the matter was heard and subsequently, the trial Court has no other option, but to proceed under Order 9 CPC. The defendant in such cases, can maintain an application under Order 13 by treating the judgment as one passed *ex parte*. However, in the present case, the facts are quite different. After filing proof affidavit, the plaintiffs marked all the documents through PW-1. When the matter was posted for cross examination of second defendant, the matter was adjourned, as the second defendant did not cross examine. Thereafter, the evidence was closed for both sides. Since the plaintiffs' side evidence is over, the trial Court dismissed the suit after framing necessary issues and considering the plea and documents available on record for deciding each and every issues against the plaintiffs.

10. The question is whether the plaintiffs are aggrieved by the judgment of the trial Court by stating that the Court ought to have adopted one of the mode prescribed under Order 9 CPC instead of disposing the suit on merits. The privileges and obligations of plaintiffs and defendants during trial are not similar, regarding the procedural aspects. The plaintiffs cannot have any grievance, if the suit is disposed of on merits, instead of granting an *ex parte* decree in the absence of defendants, when the plaintiffs have let in evidence.

11. The learned Counsel for the appellants also relied upon yet another judgment of Honourable Supreme Court in the case of B. Janakiramaiah Chetty vs A.K. Parthasarathi and others reported in (2003) 2 MLJ 186 (SC), wherein, the scope and ambit of Explanation to Order 17 Rule 2 of CPC was considered by the Honourable Supreme Court. It was a case, where the appellant before the Honourable Supreme Court filed a suit in the year 1992 claiming damages. Though written statement was filed in the said case, evidence was closed on the plaintiff's side. Subsequently, evidence on behalf



of the defendants was also closed and the matter was posted for arguments. Since the respondents were not represented, a decree was passed. An application was filed under Order 9 Rule 13 by the defendants in the suit to set aside the *ex parte* decree. Though a stand was taken by the plaintiff that the suit was disposed of on merits and not *ex parte*, the same was rejected and the application was allowed. Thereafter, revision petition was also filed by the plaintiff and the revision petition was also dismissed by the High Court. The appellant, thereafter, came before the Honourable Supreme Court and argument was also advanced before the Honourable Supreme Court stating that situational distinction between Order 17 Rule 3 and Explanation to Rule 2 has not been considered by the High Court. It was further submitted before the Honourable Supreme Court that the Explanation applies to a case where the Court proceeds to deal with a matter, as if the parties are present. In the said circumstances, the Honourable Supreme Court after referring to Order 17 Rule 2 and 3 CPC, has held as follows:

*"6. Since the controversy revolves round Order XVII Rule 2 including its Explanation, the same is quoted below, along with Rule 3 thereof, since it has relevance:*

*"Order XVII Rule 2: Procedure if parties fail to appear on day fixed- Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such order as it thinks fit.*

*Explanation: Where the evidence of a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned the Court may, in its discretion, proceed with the case as if such party were present.*

*Rule 3: Court may proceed notwithstanding either party fails to produce evidence etc. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, -*

*(a) if the parties are present, proceed to decide the suit forthwith: or*

*(b) if the parties are, or any of them is, absent, proceed under Rule 2."*

*7. In order to determine whether the remedy under Order IX is lost or not what is necessary to be seen is whether in the first instance the Court had resorted to the Explanation of Rule. 2.*

*8. The Explanation permit, the Court in its discretion to proceed with a case where substantial portion of evidence of any party has already been recorded*



and such party fails to appear on any day to which the hearing of the suit is adjourned. As the provision itself shows, discretionary power given to the Court to be exercised in a given circumstances. For application of the provision, the Court has to satisfy itself that (a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day and (c) the day is one to which the hearing of the suit is adjourned. Rule 2 permits the Court to adopt any of the modes provided in Order IX or to make such order as he thinks fit when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. The Explanation is in the nature of an exception to the general power given under the Rule, conferring discretion on the Court to act under the specified circumstance i.e. where evidence or a substantial portion of evidence of any party has been already recorded and such party fails to appear on the date to which hearing of the suit has been adjourned. If such is the factual situation, the Court may in its discretion deem as if such party was present. Under Order IX Rule 3 the Court may make an order directing that the suit be dismissed when neither party appears when the suit is called on for hearing. There are other provisions for dismissal of the suit contained in Rules 2, 6, and 8. We are primarily concerned with a situation covered by Rule 6. The crucial words in the Explanation are 'proceed with the case'. Therefore, on the facts it has to be seen in each case as to whether the Explanation was applied by the Court or not.

9. In Rule 2, the expression used is "make such order as it deems fit", as an alternative to adopting one of the modes directed in that behalf by Order IX. Under Order XVII Rule 3(b), only course open to the Court is to proceed under Rule 2, when a party is absent. Explanation thereto gives a discretion to the Court to proceed under Rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has already led evidence or a substantial part thereof. If the position is not so, the Court has no option but to proceed as provided in Rule 2. Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes mentioned in the Rule. While Rule 2 speaks of disposal of the suit in one of the specified modes. Rule 3 empowers the Court to decide the suit forthwith. The basic distinction between the two Rules. However, is that in the former, any party has failed to appear at the hearing, while in the latter the party though present has committed



any one or more of the enumerated defaults. Combined effect of the Explanation to Rule 2 and Rule 3 is that a discretion has been conferred on the Court. The power conferred is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present.

10. The crucial expression in the Explanation is "where the evidence or a substantial portion of the evidence of a party". There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The Court while acting under the Explanation may proceed with the case if that *prima facie* is the position. The Court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the Court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led or applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need, for adjourning the suit or deferring the decision."

12. The Honourable Supreme Court further found that the judgment of the lower Court is an *ex parte* adjudication, and not a decision on merits. Hence the Honourable Supreme Court held that the petition filed by defendant under Order 9 Rule 13 CPC was perfectly valid and maintainable. It has been categorically observed by the Honourable Supreme Court that in a case of this nature, if the evidence on record is sufficient for disposal of the suit on merits, there is no need for adjourning the suit or deferring the decision. The said observation of Honourable Supreme Court is appropriate in the present case and the judgment cited by the learned Counsel for the appellants is therefore against the arguments advanced by him.

13. As pointed out earlier, this is a case where, the plaintiffs have filed a suit for declaration title and burden lies on them to prove their case. Merely because, the defendants remained *ex parte*, the Court is not powerless to consider the case on merits, after giving full opportunity to the plaintiffs. The plaintiffs' evidence was closed after full opportunity was given to the plaintiffs to prove their case. When the matter was posted for cross examination of plaintiffs' witnesses by the defendants, they did not appear. Thereafter, the evidence of defendants was also closed and the matter was posted for arguments. Since the defendants did not appear, the suit was disposed of on merits. Even in such a situation, where the plaintiffs have let in evidence and heard fully, the trial Court found that the plaintiffs have not proved their case and dismissed the suit on



merits.

14. This situation cannot be taken advantage by the plaintiffs themselves by referring to Order 17 Rule 2 and 3 CPC. The scope and object of provisions as explained in the judgment of Honourable Supreme Court in **B. Janakiramaiah Chetty's** case discussed supra, the Explanation to Order 17 Rule 2 is very clear and the discretion has been properly exercised by the trial Court in this case. Regarding the merits of the case, the plaintiffs claim for title is only on the basis of an oral sale and adverse possession. Oral sale is invalid. The plea of adverse possession was also considered by the Courts below and negatived.

15. Leave alone the legal plea raised by the learned Counsel for the respondents that the plaintiffs cannot basis their case on adverse possession. The plea of adverse possession even if it is considered in the light of materials produced before the Courts below, this Court is convinced that the plaintiffs have miserably failed to establish their possession or enjoyment over the suit third schedule property. A person, who claim title to the property cannot fall back upon a plea of easement of necessity at a later stage. The Courts below have concurrently held that the plaintiffs are not the owners of the suit third schedule property and are not entitled to get a declaration of title or injunction as prayed for.

16. The findings of the Courts below are after appreciation of material evidence. It is not the case of the plaintiffs/appellants that the Courts below have refused to accept any document or misconstrued any document contrary to their tenor or contends. This Court is unable to find any other substantial questions law and the substantial questions of law raised by appellants have no substance, in view of the findings on facts by the Courts below. As a result, this Second Appeal is dismissed and the judgment and decree, dated 14.02.2017 in A.S.No.58 of 2014 on the file of the Subordinate Court, Sankarankovil, confirming the judgment and decree, dated 27.06.2014 in O.S.No.182 of 2013 on the file of the Principal District Munsif Court, Sankarankovil, is confirmed. No costs. Consequently, connected miscellaneous petitions are also closed.

Sd/-

Assistant Registrar(CS-II)

// True Copy //

Sub Assistant Registrar(CS)

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To

- 1.The Subordinate Judge, Sankarankovil.
- 2.The Principal District Munsif, Sankarankovil.
- 3.The Section Officer,  
VR Section,  
Madurai Bench of Madras High Court,  
Madurai.(2 COPIES)

+1CC TO MR.E.X.EUGENE, Advocate Sr. No.76069

+1CC TO MR.R.J.KARTHICK, Advocate Sr. No. 76202

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