



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.07.2020

CORAM::

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

S.A.NO.54 OF 2010

A.N.S.Murugan,
S/o.Subramania Mudaliar,
No.6/22, Pillayar Koil Street,
Arcot, Vellore District. ...Appellant/1st Respondent
/1st Defendant

/versus/

1. M.Sivananda Mudaliar,
S/o.M.T.Mahadeva Mudaliar,
Kudiyiruppu No.11, Nehru Street,
Arcot, Vellore District. ...1st Respondent/Appellant
/Plaintiff
2. A.N.S.Kumar,
S/o.Subramania Mudaliar,
Kudiyiruppu No.8-A,
Kanar Thiru Nilankandar Street,
Arcot, Vellore District. ...2nd Respondent/2nd Respondent
2nd Defendant

Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, praying against the judgment and decree passed in A.S.No.13 of 2006 dated 31.10.2008 on the file of the Court of Additional District Judge, (Fast Track Court-2), Ranipet in reversing the judgment and decree passed in O.S.No.42 of 1999 dated 20.12.2002 on the file of the Court of District Munsif-cum-Judicial Magistrate, Arcot.

For Appellant : Mr.A.Muthukumar,
for Mr.S.Visvanathan
For R1 : Ms.R.Sripriya,
For R2 : No appearance

J U D G M E N T

(The case has been heard through video conference)

The appellant herein is the first defendant. Aggrieved by the reversing judgment of the 1st Appellate Court, the present second appeal is filed.

2. The 1st respondent herein who laid the suit before the District Munsif-cum-Judicial Magistrate, Arcot, sought for perpetual injunction in respect of the suit schedule property alleging that the defendants are interfering his peaceful possession of the suit property. The plaintiff traced his title over the suit property, relying upon the sale deed dated 14.02.1965 executed in favour of Subramania Mudaliar and the settlement deed dated 12.10.1980 executed by Subramania Mudaliar in favour of the plaintiff. The defendants contested the suit on the ground that the property described in the documents relied by the plaintiff and the suit property for which injunction sought are not one and the same. The case of the defendant was that the plaintiff is enjoying his portion of the property fortified with compound wall. Whereas the land adjacent to the plaintiff compound belongs to the defendants. The well situated in that portion of the land was filled with soil and the land to an extend of 12 cents being enjoyed by the defendants based on partition deed of the year 1956 and subsequent sale deed of the year 1959.

3. Before the trial Court, the plaintiff and his predecessor-in-title were examined as P.W.1 and P.W.2. The sale deed dated 14.02.1965 executed by Kuppammal in favour of Subramania Mudaliar and settlement deed dated 12.10.1980 executed by Subramanian Mudaliar in favour of Sivananda Mudaliar (plaintiff) were marked as Ex.A.1 and Ex.A2. On behalf of the defendants, 1st defendant Mr.Murugan who is the appellant herein and Mr.Sundaramoorthy were examined as D.W.1 and D.W.2. In support of their case and to show the suit schedule property vest with them, the partition deed dated 26.09.1956 between Kuppammal and Subramania Mudaliar and the sale deed dated 04.12.1959 executed in favour of Navaneethaammal by Kuppammal and three others were marked as defence exhibits Ex.D1 and Ex.D2.

4. The specific case of the defendants is that the plaintiff has not properly described the suit property in the plaint schedule. The portion over which the plaintiff claims right actually belongs to the defendant and when title is in dispute, suit for bare injunction without relief for declaration of title is not maintainable.

5. According to the defendant's, originally the land to an extent of 2 acres 2 cents in S.No.276/1 was jointly held by Subramania Mudaliar and Rajarathina Mudaliar. On demise of Rajarathina Mudaliar, in the year 1956, partition was effect between Subramania Mudaliar and Kuppammal, the wife of Rajarathina Mudaliar. each got 1 acre 1 cent. Kuppammal through whom plaintiff claims right over the property is one of the signatory to the partition deed. In the partition, the well portion was allotted to the defendant's predecessor-in-title. Therefore, the plaintiff is not entitled for the relief sought, since he claims right over the portion of the land appurtenant to the well.

6. The trial Court, on considering the evidence found that there is a discrepancy in the extent of land mentioned in Ex.A.1 and Ex.A.2. The plaintiff has failed to explain the discrepancy. The document relied by the defendants refers about the existence of well. Whereas the plaintiff documents are silent about existence of 'well' in their land. The well and the land appurtenant to the 'well' being the subject matter of the suit and the plaintiff having failed to prove his possession, the trial Court dismissed the suit.

7. Aggrieved by the dismissal of the suit, the plaintiff has preferred the Appeal Suit in A.S.No.13 of 2006 before the Additional District Judge, Fast Track Court, Ranipet.

8. In the course of appeal, the plaintiff/appellant has taken out an application I.A.No.29 of 2006 under Order 41 Rule 27 of C.P.C., to receive additional documents namely partition deed dated 30.05.1988, entered between Tmt.Baraniammal, A.N.S.Murugan, (1st Defendant) and A.N.S.Kumar (2nd Defendant). Though the receipt of the additional document was opposed by the respondent/defendants, same was admitted into evidence and marked as Ex.A.3. The Trial Court has relied on this document and reversed the trial Court judgment holding that in Ex.A.3 partition deed, entered between the family members of the defendants there is no reference about the well. The 1st defendant aggrieved by the same has preferred the Second Appeal.

9. The Learned Counsel for the appellant would submit that apart from other substantial questions of law, the judgment of the 1st Appellate Court bound to be set aside for not following the procedure laid under the Code, for receiving the additional documents at the appellate stage.

10. The Learned Counsel for the appellant would submit that the Lower Appellate Court has erred in law by allowing the petition to receive the additional document without calling for evidence to prove the execution and the content of the said document. The Learned Counsel reading out the relevant portion

of the Lower Appellate Court judgment, regarding the admission of additional document submitted that the Lower Appellate Court has erred not only by admitting the document also without being proved had strongly relied upon that document for reversing the trial Court judgment.

11. The specific case of the defendant was that the subject well was closed in the year 1985, whereas the additional document Ex.A3 is of the year 1988. The Lower Appellate Court has erroneously held that since there is no reference about the well in the newly admitted document marked as Ex.A.3, the defendants have failed to prove the existence of the well in his portion of the land. The Appellate Judge has shifted the burden of proof on the defendants regarding existence of well.

12. The learned counsel appearing for the respondent state that, Ex.A3 is an undisputed document, therefore formal proof of it is not required.

13. This Court is in agreement with the appellant. As pointed by the Learned Counsel for the appellant, the 1st Appellate Court has committed grave error by admitting the additional document without proof. The Lower Appellate Court has failed to follow the procedure contemplated under Order 41 Rule 28 of C.P.C., while admitting the additional evidence.

Order 41 Rule 28 of C.P.C., reads as below:-

"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."

14. In this case, the 1st Appellate Court has failed to give opportunity to the appellant herein to contest the admissibility and relevancy of the document produced as additional evidence. In a similar circumstances, the Hon'ble Supreme Court in Corporation of Madras and another Vs. M.Parthasarathy and others reported in 2018 (8) MLJ 208 (SC) has held that;

"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.

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 retrial of all the four civil suits on merits afresh."

15. In this case also the 1st Appellate Court has failed to follow the mandate contemplated under Order 41 Rule 28 C.P.C.. Further had heavily rely upon the additional document to base his findings. Therefore, the judgment and decree of the Lower Appellate Court which is impugned in the Second Appeal is liable to be set aside. Accordingly, the Second Appeal is Allowed. The judgment and decree passed by the trial Court in A.S.No.13 of 2006 is set aside. The matter is remanded back to the 1st Appellate Court to rehear the appeal afresh along with I.A, filed for receiving additional document. If the Lower Appellate Court is of the opinion that there is a reasonable ground to receive the additional evidence, the Learned Judge shall follow the mode of taking additional evidence and act in accordance with law.

16. In the result, the Second Appeal is Allowed. The judgment and decree passed by the Additional District Judge, (Fast Track Court-2), Ranipet in A.S.No.13 of 2006 is set aside. The 1st Appellate Court shall record the evidence in respect of the document sought to be produced as additional evidence. After affording opportunity to the appellant herein to cross examine the witness, the Lower Appellate Court shall decide the application and the appeal suit on merits. The Lower Appellate Court is directed to dispose the appeal preferably by end the of

31st December 2020. Registry is directed to return back the original records to the Lower Appellate Court forthwith. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

bsm

To

1. The District Munsif-cum-Judicial Magistrate, Arcot.
2. The Additional District Judge, (Fast Track Court-2), Ranipet.
3. The Section Officer,
V.R.Section,
High Court, Madras.

S.A.No.54 of 2010

SPD(CO)
KKV/27/11/2020



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