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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.10.2021

CORAM

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

SA NO.825 OF 2014
AND MP NO.1 OF 2014

1.G.Vadivel
2.Amsavalli

... Appellants/Defendants 1 &2
VS.

1. E.Karunan
2. The Assistant Engineer
O & M, T.N.E.B.,
Rayakottai, Denkanikottah Taluk,
Krishnagiri District - 635 116.

... Respondents/
Plaintiff & 3rd Defendant

PRAYER: Second Appeal filed under Section 100 of Code of Civil Procedure against the judgment and decree of the learned Principal District Judge, Krishnagiri dated 03.01.2013 in A.S.No.16 of 2012 reversing the judgment and decree of the learned Subordinate Judge of Hosur, dated 23.12.2011 in O.S.No.99 of 2005.

For Appellants : Mr.J.Hariharan
for Mr.V.Nicholas

For Respondent-1 : Mr.A.K.Kumarasamy
Senior Counsel
for Mr.S.Kaithaimalaikumaran

J U D G M E N T

Aggrieved over the reversal of the finding by the First Appellate Court, the defendants have preferred the above Second Appeal.

2.The plaintiff/first respondent herein filed a Suit for declaration of title and recovery of possession. According to him, the property was originally owned by one Azizullah Khan and Shafiullah Khan, sons of Late Hussein Khan Sahib, under the registered sale deed dated 21.10.1985 which followed by an



agreement of sale dated 05.03.1983. The plaintiff's father purchased this property and gifted it to him by virtue of a settlement deed. Thereafter, the defendants have set up a rival claim on the basis of an unregistered sale deed dated 20.07.1968 in favour of the first defendant. The title of the vendors of the defendants traced to a registered WILL dated 02.10.1968. The plaintiff denied the existence of the so called WILL as well as the unregistered sale deed through which the defendants claimed title on the ground that the WILL was registered at Rayakottai and the unregistered sale deed said to have been executed at the Office of the Sub Registrar, Krishnagiri.

3.It is the case of the plaintiff that the properties were leased out to the defendants for doing their business. But, without consent of the plaintiff or his father, they altered the nature of the building and thereby committed damages. Therefore, he prayed for declaration of title and recovery of possession and also mesne profits.

4.In the written statement, the defendants denied all the averments and contended that originally the Suit property belonged to one Hussein Khan, who sold it in favour of their father on 20.07.1968. Eversince the date of purchase by the defendants father, they were in possession and enjoyment of the Suit property and as absolute owners, they were enjoying the properties as per their wish. They have obtained loan from T.I.I.C. Ltd., Dharmapuri in the year 1981 for the purpose of running lathe machine under the name and style of M/s.Manjunatha Engineering Industries in the said property and also obtained electricity service connection on 08.07.1984 and are paying property tax to the Rayakottai Panchayat. The plaintiff has created problem on the basis of fabricated documents. Hence, he filed a Suit in O.S.No.89/1999 on the file of District Munsif Court, Denkanikottah. After contest, the Suit was dismissed on 07.08.2001 on erroneous grounds against which, he filed an appeal in A.S.No.28/2001. In the appeal, the respondents therein, namely Elangovan and Karunan filed I.A.No.28/2002 for reception of additional evidence. The Appellate Court, had set aside the decree and judgment dated 07.08.2001 in O.S.No.89/1999 and remanded the matter for framing issues and deciding the case afresh and dispose of the same within a period of three months. Against the remand order, the defendants have preferred an appeal in CMA No.1530/2004, in which, this Court has granted interim stay on 05.05.2004. In the meantime, the Suit in O.S.No.89/1999 was dismissed for default on 20.04.2004. Therefore, the contention of the plaintiff as absolute owner on the basis of the gift deed executed by his father on 02.07.1997 is false. The father of the plaintiff himself is not entitled to the property. The description of the property and the linear measurements were wrongly given and they were not rectified in



the sale deed. Therefore, in the absence of property description, the contention of the plaintiff as to the alteration of the property is not sustainable and only because the sale deed was not registered, it cannot be declared as void and non-est for the purchase made for a valid sale consideration of Rs.90/- at that point of time. Even the leasing out by the plaintiff's father was also denied and the Suit was sought to be dismissed.

5.The Trial Court framed appropriate issues and dismissed the Suit holding that the plaintiff has not proved his title. Aggrieved over the same, the plaintiff has preferred an appeal in A.S.No.16/2012. In the said appeal, the present appellants herein remained exparte. During the pendency of the appeal, the first respondent / plaintiff filed an application under Order 41 Rule 27 CPC for receiving additional documents. The First Appellate Court received the additional documents and allowed the appeal relying on the said additional evidence. Aggrieved over the same, the appellants/defendants have preferred the above Second Appeal.

6.The Second Appeal was admitted on 15.03.2019 on the following substantial questions of law:-

"1.Whether the lower Appellate Court is correct in reversing the judgment of the trial Court without considering the admission is best piece of evidence and as such, there is perversity in upholding the claim of the plaintiff.

2.When the extent and description of the suit property are different in the property described in the agreement of sale of the year 1983, the sale deed of the year 1985 and gift deed of the year 1997 relied on by the plaintiff whether the lower appellate Court is correct in granting the decree contrary to the evidence of the plaintiff himself."

7.The learned counsel for the appellants relied on a judgment of the Hon'ble Supreme Court in CORPORATION OF MADRAS AND ANOTHER VS. M.PARTHASARATHY AND OTHERS [2018 (8) MLJ 208 (SC)] in support of his contention that while receiving the additional piece of evidence, the First Appellate Court shall provide an opportunity to the respondents, to file un-rebuttable evidence to counter the additional evidence adduced by the appellants in the first appeal. If such opportunity is not afforded, it will prejudice the party contesting the appeal and that adverse order passed by the Appellate Court does not



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conform to Order 41 Rules 23 to 25 CPC. In the said judgment, the Hon'ble Supreme Court has observed as under:

"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 / decree 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 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."

8. Therefore, when the First Appellate Court received Exs.A18 to A26, no opportunity was provided to the appellants and that the First Appellate Court has failed to adhere to the procedure laid down under Order 41 Rule 25 CPC. The documents were not subjected to any proof and an opportunity to rebut the documents was not afforded. When the additional documents were received for the purpose of proving the documents, the First Appellate Court either should have set aside the judgment in its entirety and remanded the matter to the Trial Court for fresh evidence or while retaining the appeal, should have remitted the matter to the Trial Court to give its finding on the basis of the particular additional documents received. The First Appellate Court has failed to adopt either of the courses and therefore, the judgment of the First Appellate Court is liable to be set aside and the matter has to be remanded for giving opportunity to the respondents to rebut the admissibility of the documents.



9. On the other hand, the learned Senior Counsel appearing for the respondents would rely on Rule 2A of Order 12 CPC. According to him, the appellants herein were put on notice and the Memorandum of appeal was served on them, but they failed to appear before the First Appellate Court. On the other hand, the respondent, who was present and contested the appeal, had expressed no objection and the documents were admitted and relied on by the First Appellate Court. As per Rule 2A Order 12 CPC, when a party is called upon to admit and he does not deny it specifically or by necessary implications, it is deemed to have been admitted. In the absence of any objection specifically in writing or by deemed implication by the appellants herein, the documents were rightly received in evidence and admitted by the First Appellate Court, while deciding the appeal, particularly when the third respondent, who was contesting the appeal had no objection for admitting the documents. It is not necessary that the First Appellate Court has to direct the plaintiff to prove the said documents. Proviso to Rule 2A specifically states that the First Appellate Court at its discretion and for the reasons recorded required any documents so admitted to prove otherwise by such time. In the instant case, no such contingency arose for directing proof of such documents. Therefore, a person who absented himself throughout the appeal is not entitled to raise such an objection and therefore, the contention cannot be accepted and the Second Appeal is liable to be rejected.

10. I have heard the submissions of both sides.

11. Admittedly, there were two rival Suits by both the sides. First Suit was filed by the appellants herein in O.S.No.89/1999 on the file of District Munsif Court, Denkanikottai, for the relief of declaration of title and injunction restraining the present respondent from interfering with his possession. He relied on an unregistered sale deed dated 20.07.1968 which was pursuant to one registered WILL dated 02.10.1968. The Trial Court dismissed the Suit holding that the plaintiff has not proved his title. On appeal, the respondents have filed certain additional documents and the matter was remitted back to the Trial Court and it was dismissed for default on 20.04.2004. In the meanwhile, the appellants herein have preferred an appeal and it is submitted that this Court by its order, has set aside the order of remand and directed the Sub Court to decide the appeal on merits. The said appeal was dismissed on 23.12.2011.

12. It is also to be noted that the first respondent herein has filed a Suit for declaration of title and for recovery of possession in O.S.No.99/2005 on 05.10.2005 which is the subject matter of the present appeal and the same was



dismissed on the very same day i.e., 23.12.2011 on which date, A.S.No.28/2001 was dismissed.

13.The crucial question which arise for consideration in this appeal is as to what is the effect of the decision rendered in A.S.No.28/2001 and the admission of those documents without proof as contemplated under Order 41 Rule 28 CPC. The learned counsel was heard to say that whether or not the declaration of title is granted that will not automatically entitle the defendants for declaration of title. Therefore, the decision made in A.S.No.28/2001 in respect of the very same subject matter between the very same parties will not operate as res-judicata. The plaintiff shall rely on his case on its own strength and any decision rendered in the other litigation will not confer title on the other party. In so far as that question is concerned, in the previous round of litigation, the case of the plaintiff is that the appellants father became the title holder on the basis of the unregistered sale deed dated 20.07.1968. That unregistered sale deed was not admitted and the title was denied against the appellants. In the very same Suit, the Trial Court has also refused to accept the case projected by the respondents herein and held that the respondents are not entitled to ownership of the property. The First Appellate Court has confirmed the findings with respect to the dismissal of the Suit against the present appellants. There is no appeal as against the first appeal in A.S.No.28/2001 dated 23.12.2011. Therefore, it is clear that the judgment and decree with respect to the title of the property has attained finality and the appellants herein are not entitled to the title to the property. What remains to be decided is whether they are entitled to possession or not? Admittedly, when the title is denied, then they need to be treated either as lessee or as trespassers.

14.In so far as the question with regard to the reliance placed by the First Appellate Court on the additional documents received under Order 41 Rule 27 CPC is concerned, the documents which were marked as Exs.A18 to A26 were the documents, which were marked exhibits in O.S.No.89/1999 as Exs.B1 and B5. The additional documents were certified copies of the documents marked before the Trial Court in O.S.No.89/1999.

15.Be that as it may, as far as the procedure contemplated under Order 41 Rule 28 CPC is concerned, once the Appellate Court receives the additional documents in evidence, it shall direct the parties to let in evidence, whether in the very same Court or to the Subordinate Court, who passed the decree to take such evidence and send back or to set aside the entire judgment and decree and remanded the matter back.

16.It is relevant to note that Rule 2A of Order 12 CPC



specifies procedure with regard to the documents which were deemed to be admitted. Order 12 CPC deals with a situation whether the parties admits the truth of a holder or any part of the case of any other party. In such circumstances, when a party gives a notice calling upon the other party to admit the documents and if it is not specifically denied by necessary implications, it is deemed to be admitted. Rule 2A may not have an application to the case on the circumstances which fall under Order 41 Rule 27 CPC.

17. In this case, the documents which were received as additional evidence, the course to be adopted is that the documents have to be proved by adducing evidence by the party who files the petition under Order 41 Rule 27 CPC. But the fact remains that the documents which were received as additional evidence are the documents which were proved in the previous Suit is between the same parties with respect to the very same subject matter.

18. Be that as it may, the appellants remained exparte and did not participate in the appeal till the appeal was decided against them. Whereas the third respondent contested the Suit and he has recorded no objection for admitting the said documents. In effect, the contesting party admits the documents. In the considered opinion of this Court, it deems to have been admitted and further evidence is not required. More particularly, these documents were pleaded and proved in the previous round of litigation in O.S.No.89/1999. A party who failed to appear and prosecute the appeal and failed to object the admission of these documents, cannot have a say, that the procedure laid down by law under Order 41 Rule 27 CPC is not followed. The Court either suo motu or on application can call for the documents in the previous round of litigation, it is a record of the Court and take a possession. It is not that the appellants were taken by surprise or new documents or new case is projected by the respondents. Having failed to prosecute the appeal diligently, the appellants are precluded from raising such an issue in the Second Appeal.

19. Even though the Second Appeal was not admitted on this above question of law, the Court holds that the issue raised by the appellants is not sustainable in the Second Appeal. In so far as the questions of law on which the Second Appeal is admitted is concerned, it is based on pure question of facts. The description of property as found in the agreement of sale and the sale deed is not a substantial question of law and therefore, it is answered against the appellants. It is the look out of the respondents to face the issue before the Execution Court. It is not the case that the appellants were presented the appeal and they were deprived of the opportunity to rebut the



proof that they were absent. Therefore, they cannot raise the issue at this belated stage.

20. In fine, the questions of law are answered against the appellants and the Second Appeal stands dismissed. No costs.

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Sd/-
Assistant Registrar (CS IX)

//True Copy//

Sub Assistant Registrar

TK

To

1. The Principal District Judge
Principal District Court
Krishnagiri.
2. The Subordinate Judge
Subordinate Court
Hosur.
3. COPY TO
The Section Officer,
VR Section,
High Court, Madras-104.

+1cc to Mr.V.Nicholas, Advocate, S.R.No.52064

+1cc to Mr.S.Kaithaimalaikumaran, Advocate, S.R.No.52254

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