



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 05.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE **G.R. SWAMINATHAN**

S.A.(MD)No.83 of 2008

WEB COPY

Chellasamy

... Appellant/Cross Objector-2nd
Respondent/2nd Defendant

-Vs-

1.V.S.Benni

2.V.S.Benila (minor)

3.V.S.Bensili (minor)

(Minors 2 & 3 are represented by
guardian their mother 4th respondent)

4.Sarojini Bai

...Respondents 1 to 4/Respondents-
Appellants /Plaintiffs

5.Rajendra Prasad

...5th Respondent/Respondent-1st
Respondent/1st Defendant

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the Judgment and decree in A.S.No.29 of 2003 dated 16.12.2006 on the file of the Sub-ordinate Judge, Kuzhithurai, confirming the Judgment and decree in O.S.No.410 of 1997, dated 10.02.2003 on the file of the II Additional District Munsif, Kuzhuthurai.

For Appellant	: Mr.K.N.Thampi for Mr.K.Sreekumaran Nair
For R1 & R4	: Mr.S.Kumar
For R2 & R3	: Minors represented by R4
For R5	: Mr.K.Esakki

JUDGMENT

The second defendant in O.S.No.410 of 1997 on the file of the second Additional District Munsif Court, Kuzhithurai, is the appellant in this second appeal.

2.The said suit was filed by the respondents 1 to 4 herein seeking the relief of partition in respect of 7 cents of land in the suit property. The suit was resisted by the appellant herein on very many grounds. The trial Court, after a consideration of the evidence on record, dismissed the suit by Judgment and decree dated 10.02.2003. Aggrieved by the same, the plaintiffs filed A.S.No.29 of 2003, before the Sub Court, Kuzhithurai. Since the trial Court had also rendered adverse findings against the appellant herein, he filed cross objection. The first appeal filed by the plaintiffs as



well as the cross objection filed by the appellant herein / D2 were dismissed by judgment and decree dated 16.12.2006. Challenging the dismissal of the cross objection, this second appeal has been filed by the second defendant.

3.The second appeal was admitted on the following substantial question of law:-

"Whether the first appellate Court is right in dismissing the cross appeal filed by the appellant as a consequence of dismissal of the main appeal preferred against the judgment and decree of the trial Court after giving finding to the effect that Ex.B8 marked on the side of the appellant herein is binding on the respondents herein?"

4.Heard the learned counsel on either side.

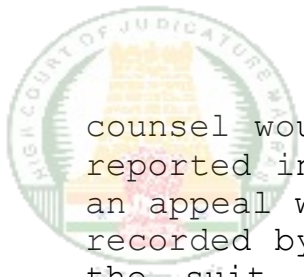
5.One of the defences taken by the appellant herein was that he had filed O.S.No.349 of 1991 before the Principal District Munsif Court, Kuzhithurai seeking the relief of declaration, permanent injunction and for cancellation and that the said suit was decreed by judgment and decree dated 02.12.1997.

6.The learned counsel for the appellant would point out that the first defendant Rosemary was none other than the vendor of the plaintiffs and that therefore, the judgment and decree passed in the said suit would squarely bind the plaintiffs herein. According to him, the trial Court erroneously gave a finding that the said Judgment and decree does not bind the plaintiffs herein. His primary contention is that without framing an issue as regards the binding nature of judgment and decree made in O.S.No.349 of 1991, the trial Court could not have given a finding adverse to the appellant. Though it is true that the first Appellate Court did frame an issue in this regard, he pointed out that the first Appellate Court is obliged to frame only a point for consideration. He faulted the approach of the Court below.

7. Before I answer this contention of the learned counsel for the appellant, I must note that the substantial question of law has been framed on an erroneous assumption that the Appellate Court had mechanically dismissed the cross objection merely because the main appeal filed by the plaintiff got dismissed.

8.I went through the impugned judgment passed by the first Appellate Court. The first Appellate Court had independently confirmed the adverse finding rendered by the trial Court against the appellant herein.

9.The learned counsel appearing for the respondents would question the maintainability of the appeal. According to him, a second appeal will not lie against a mere finding. The learned



counsel would place reliance on a decision of the Madras High Court reported in **2011 5 CTC 430 (Thamilarasi Vs. Selvam)** which held that an appeal will lie only against a decree and not against any finding recorded by the Court at the instance of the party who succeeded in the suit. But as rightly pointed out by the learned counsel appearing for the appellant, even though the suit was dismissed under Order 41 Rule 22 C.P.C, the respondent in an appeal is entitled to question any adverse finding rendered against him. In this case, he had also filed a cross objection. The first Appellate Court, by the impugned judgment and decree, had dismissed the appeal as well as the cross objection. The dismissal of the cross objection would amount to decree. Hence, the second appeal is very much maintainable.

10. Coming to the facts of the case, it is seen that the plaintiffs herein had purchased suit schedule property vide Ex.B15, Ex.B17 and Ex.A2. These transactions had taken place well before filing of O.S.No.349 of 1991. It is true that the appellant Chellasamy had arrayed Rosemary, the vendor of the plaintiffs herein, as one of the defendants. But even before O.S.No.349 of 1991, came to be instituted, Rosemary had already parted with the suit property. It is for that reason, an observation was made by the trial Court that the said judgment and decree cannot be said to be binding on the plaintiffs herein. Though no specific issue was framed by the trial Court, the first Appellate Court had framed a specific issue in that regard and after hearing both the parties, had confirmed the finding of the trial Court. The appellant cannot be said to have suffered any prejudice. The entire evidence was available before the first Appellate Court and therefore, the appellant cannot complain any infraction of procedure. As already pointed out, the very framing of substantial question of law was on the erroneous assumption that the first appellate Court after reversing the finding rendered by the trial Court, mechanically dismissed the cross appeal. It is not so. Since no substantial question of law has really arisen, the second appeal is dismissed. No costs.

Sd/-

Assistant Registrar (Cs-III)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To

1.The Subordinate Judge, Kuzhithurai.



2.The Second Additional District Munsif, Kuzhithurai.

Copy to

The Section Officer, (2C)
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.K.SREEKUMARAN, Advocate (SR-21321[F] dated 06/07/2021)

+1 CC to M/s.K.ESAKKI, Advocate (SR-21441[F] dated 07/07/2021)

+1 CC to M/s.S.KUMAR, Advocate (SR-21406[F] dated 06/07/2021)

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