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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.03.2022

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

C.M.A.NO.2189 OF 2018

AND

C.M.P.NO.17054 OF 2018

O.N.Raju

... Appellant/Respondent/Plaintiff

Vs

K.Krishnan

... Respondent/Appellant/Defendant

Prayer: Civil Miscellaneous Appeal filed under Order 43 Rule (1)(U) of the Civil Procedure Code, against the Judgment and Decree dated 06.08.2018 made in A.S.No. 33 of 2017 on the file of Sub Court, Conoor, remanding the matter back in O.S.No. 68 of 2008 dated 10.11.2016 on the file of District Munsif Court, Kotagiri.

For Appellant : Mr.R.Krishna Prasad
for M/s.Sarvabhauman Associates

For Respondent : Mr.Naveen Kumar Murthi

JUDGMENT

Civil Miscellaneous Appeal has been filed questioning the Judgment dated 06.08.2018 passed by the learned Sub Judge, Coonoor, in A.S.No. 33 of 2017 which Appeal Suit had been filed by the defendant in O.S.No. 68 of 2008, which suit had been decreed by the District Munsif, Kotagiri, by Judgment dated 10.11.2018.

2. O.S.No. 48 of 2002 was filed originally before the District Munsif, Kotagiri, by K.Krishnan against the defendant O.N.Raju, seeking a Judgment and Decree that the plaintiff is the absolute owner of the plaint schedule property and for consequential injunction restraining the defendant from



interfering with peaceful possession. There were two items of suit properties. The 'A' schedule property measured 38 16 acres and out of that total extent the land conveyed was 0.13 cents situated in Denad Village in S.No. 74/2A1 in Kotagiri, Nilgiris District. The 'B' schedule property measured 4.74 and out of that total extent the land conveyed was 0.07 cents and it was also situated in Denad Village in S.No. 72 again in Kotagiri, Nilgiris District.

3. In the plaint, it had been stated that the properties originally belonged to one J.Matha Gowder, the father of the vendor of the plaintiff. He was in possession and enjoyment of the suit property along with other family properties. It then came to be possessed by the joint family constituting the vendor of the plaintiff J.M.Krishnan and his two brothers J.M.Nanjan and N.M.Bellam. The said J.Matha Gowder, the original owner died in the year 1985. Thereafter, J.M.Nanjan the brother of the vendor of the plaintiff, also passed away in the year 1995. There was a partition between J.M.Krishnan and J.M.Bellam on 03.09.1994. The plaintiff claimed that he become the absolute owner of the suit properties by virtue of two sale deeds both dated 07.12.2001 registered as Document Nos. 1562 & 1702 of 2001 respectively before the Sub Registrar, Kotagiri and executed by J.M.Krishnan.

4. According to the plaintiff, the defendant claims to have purchased the property from J.M.Bellam, the brother of J.M.Krishnan.

5. In view of this peculiar situation, wherein the same properties had been sold to the plaintiff and the defendant by two brothers acting independently, the plaintiff was forced to lodge a complaint before the jurisdictional police. There were two separate sets of sale deeds with respect to the same properties. One conveying the properties to the plaintiff and the other conveying the properties to the defendant. The vendor of the plaintiff was J.M.Krishnan and the Vendor of the defendant was J.M.Bellam. Naturally, the police refused to interfere and claimed that the entire issue was civil in nature. The plaintiff was therefore necessitated to institute a suit for declaration of title and for permanent injunction.

6. The defendant O.N.Raju, had filed a written statement along with counter claim. Provision for filing a counter claim is under Order 8 Rule 6(A)(i) CPC. Quite apart from denying the averments made in the plaint, the defendant further stated that after a family partition, the properties which has been described in the suit schedule had been actually allotted to J.M.Bellam, who had executed a sale deed in favour of the



defendant and that, the sale deed contained the description of the properties with specific boundaries and, the sale deed was executed on 06.11.2001. It was also stated that the plaintiff's vendor J.M.Kirhsnan had also confirmed that particular transaction. It was also asserted that the defendant was in physical possession of the suit properties. The observation of the plaintiff that he had purchased the properties was disputed and denied by the defendant in the written statement. Since the defendant claimed to be in possession, the written statement also contained a counter claim claiming the relief of permanent injunction against the plaintiff.

7. This necessitated, a reply to be filed by the plaintiff. The Civil Procedure Code provides filing of a reply to a counter claim as a matter of right. A reply was filed by the plaintiff. However, the plaintiff then chose to withdraw the suit in O.S.No. 48 of 2002.

8. Once that plaint had been withdrawn, the counter claim necessarily had to be examined and issues had to be framed. This counter claim on withdrawal of O.S.No. 48 of 2022 was numbered as O.S.No. 68 of 2008.

9. On the basis of the averments made therein, the parties went to trial before the District Munsif, Kotagiri. The following issues were framed for trial:-

(i) Whether the sale deed dated 07.12.2001 is valid, binding on the parties?;

(ii) Whether the suit properties were still not partitioned?;

(iii) Whether the plaintiff / in effect the defendant in O.S.No. 48 of 2002 / counter claim / plaintiff in O.S.No. 68 of 2008 was entitled for the relief of permanent injunction?; and

(iv) To what other reliefs, the parties are entitled to?

10. The parties were invited to graze the witness box. Witnesses were examined and documents were marked.

11. On the basis of the available evidence, the District Munsif proceeded to answer the issues. He took up as the first issue for consideration, the sale deed dated 07.12.2001 and with respect to that particular issue had further examined Ex.A-3, which was the sale deed dated 31.03.2003. That particular sale deed related to S.No. 74/2A1 measuring a larger area of 38 16



acres out of which 0.50 acres were claimed to have been conveyed. The District Munsif Court observed that the said 0.50 acres had been dealt with on 04.10.1995 by way of sale. It had therefore been stated that when there were no properties available in the particular survey number. J.M.Krishnan, who was the vendor of the original plaintiff, could not have conveyed any property much less property by way of sale deed dated 07.11.2001. In view of that particular observation, the Court answered the issue against the plaintiff in O.S.No. 48 of 2002.

12. Thereafter, the District Munsif, examined the third issue with respect to permanent injunction and found that the counter claimant was in possession. In this connection, the District Munsif also observed that a Judgment had been passed in earlier suits wherein the legal representative of the J.Matha Gowder, J.M.Krishnan had sold the property and also sought partition and in that particular suit, it had been found that the plaintiff in O.S.No. 48 of 2002 was not in possession. The fact that the vendor of the plaintiff in O.S.No. 48 of 2002 did not have any property to convey in S.No. 74/2A1 was again reasserted by the District Munsif. Finally, it was found that the defendant in that particular suit/Plaintiff in O.S.No. 68 of 2008 was in possession and therefore, the counter claim was allowed and a decree was passed in the counter claim granting permanent injunction.

13. Questioning this particular Judgment granting permanent injunction in the counter claim, A.S.No. 33 of 2017 had been filed. It could be presumed that the plaintiff in O.S.No. 48 of 2002, who in virtue of the counter claim being filed became the defendant in O.S.No. 68 of 2008 was the appellant before the First Appellate Court. He challenged the grant of decree of permanent injunction on the basis on the counter claim restraining him from disturbing the peaceful possession of the counter claimant. The Judgment rendered in the said Appeal is the subject matter of the present Civil Miscellaneous Appeal.

14. To recall the facts, O.S.No. 48 of 2002 had been filed by K.Krishnan against O.N.Raju. He sought declaration of title and permanent injunction with respect to the properties described in the suit schedule. Along with the plaint, ten documents had also been filed. On receipt of suit summons, written statement was filed by the defendant O.N.Raju.

15. O.N.Raju also filed a counter claim claiming permanent injunction over the very same properties. Along with the counter claim, he also filed five documents.



16. For some reason, neither of the counsels here are directly aware nor have informed to this Court. K.Krishnan, the plaintiff in O.S.No. 48 of 2002 withdrew the suit. The effect of withdrawal of the suit indicates that the plaintiff, K.Krishnan, had no further intention of prosecuting the relief sought in the plaint. This would also imply that the plaint was withdrawn and consequently, the documents filed along with the plaint were also withdrawn.

17. Pleadings consists not only the plaint but also the documents filed along with the plaint. Both are considered as one set, as pleadings filed before the Court. In support of the averments made in the plaint, documents are filed and have to be read along with the averments made in the plaint.

18. A plaint can still survive without supporting documents and leave and liberty can be granted and is also available in the statute for documents to be filed subsequently, if necessary cause is shown as to why they had not been presented along with the plaint. But there cannot be an independent adjudication of a set of documents in the absence of pleadings, which were the basis for which the documents were originally filed. The documents are claimed to be relevant by the plaintiff verifying the plaint and also necessary to prove the averments in the plaint. Without any averment or pleadings, the documents cannot stand alone. They will only be writings in paper without any evidenciary value.

19. When K.Krishnan, the plaintiff in O.S.No. 48 of 2002 had taken a conscious decision to withdraw the plaint, it only means that he had withdrawn all averments made in the plaint, not only the averments relating to his right to seek declaration of title over the properties but also the averments by which he disputed the defendant's right over the properties, but also withdrew the documents filed along with the plaint. The plaint and the documents, as one set of papers becomes non existent. The suit is struck off from the suit register. It no longer exists on the record.

20. Since a counter claim had been filed by the defendant, the Code of Civil Procedure provides that the counter claim will have to be examined as if it is a plaint.

21. Therefore, the counter claim was then allowed to be numbered in O.S.No. 68 of 2008. The trial to test the averments made in O.S.No. 68 of 2008 was conducted by the District Munsif at Kotagiri, who passed a Judgment in the counter claim in O.S.No. 68 of 2008 granting permanent injunction.



25. A perusal of the aforementioned two provisions, leads us to the conclusion that a defendant in a suit apart from denying the averment made in the plaint by filing a written statement also has a right to file, what has been termed in the statutory books as a counter claim. When a counter claim is filed necessarily it has to be valued and the Court fees will have to be paid on such valuation.

26. It also provides that such a counter claim will have the same effect as a cross suit. But when the original suit itself is withdrawn then the counter claim can stand independently as a plaint by itself. It is an assertion of a particular right by the defendant, who claims a relief against the original plaintiff and who values that particular relief for adjudication and pays necessary Court fees in accordance with such valuation.

27. Rule 6 A(2) of Order of stipulates that the Court should pronounce a Judgement not only on the suit but also on the counter claim. Order 8 (6) (D) speaks about discontinuation of the suit which has happened in the instant case and provides that the counter claim should however be proceeded with. The plaintiff in the instant case had withdrawn O.S.No. 48 of 2002. If the suit of the plaintiff is discontinued, the Rule provides that the counter claim must however be proceeded with.

28. The District Munsif therefore adopted the correct procedure in proceeding further with the counter claim. He framed issues. He invited both the parties to graze the witness box. The documents available were marked. If the original plaintiff wanted to mark documents, he should have filed necessary application seeking permission to produce documents and to mark them. He might have filed documents along with the original plaint but since a conscious decision had been taken to withdraw the plaint, it also implies and as a matter of fact, it directly implies that he had also taken a conscious decision to withdraw the documents and that the documents filed along with the plaint need not be considered by the Court and that the documents are withdrawn from the purview of the Court. There is no obligation on the part of the Court to go searching for documents which have been withdrawn.

29. Documents when presented before the Court shall be examined on the basis of their admissibility, on the basis of their relevancy and examined whether they have been proved in the manner known to law. If they are primary documents, they can be taken on record. If they are secondary documents, the reasons why the primary documents had not been produced must be examined. These are the steps to be taken during the course of



trial. After having withdrawn the plaint and having withdrawn the documents as a consequence thereof, the plaintiff cannot thereafter complain that the Court did not examine the documents filed along with the plaint.

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30. In the instant case, the First Appellate Court has stepped into the shoes of the plaintiff and had put up a specious argument in the course of the Judgment now under appeal found fault with the District Munsif for not having marked the documents filed along with O.S.No. 48 of 2002, though the said suit had been withdrawn.

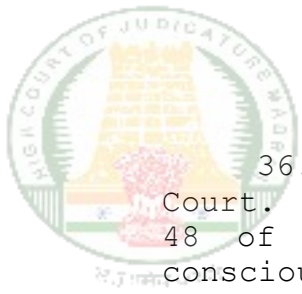
31. It is held that once the plaint is withdrawn the document are withdrawn from the scrutiny of the Court. The plaintiff has expressed that intention by withdrawing the plaint. It does not lie in the mouth of the Court to go searching for thousand documents and mark them as exhibits and base Judgment on the basis of those documents.

32. When presented with an appeal, the First Appellate Court having observed that the plaint in O.S.No. 48 of 2002 had been filed along with a set of documents but had been withdrawn had still proceeded to observe that since those documents were already on record, the District Munsif should have marked those documents as exhibits and since those documents were not marked as exhibits found fault with the procedure adopted by the District Munsif and directed that the District Munsif should mark those documents and for that purpose had remanded the suit for re-hearing. That order of remand is now under challenge in the present Civil Miscellaneous Appeal.

33. Order 43 Rule 1(u) provides that an order of remand either under Order 41 Rule 23 or under Order 41 Rule 23-A is appealable in nature. Taking advantage of that particular provision, the appellant is before us.

34. Heard arguments advanced.

35. The contention of the learned counsel for the appellant herein is that the respondent having taken a conscious decision to withdraw O.S.No. 48 of 2002, could not have been presented with an opportunity by the first appellant Court to mark the documents filed along with O.S.No. 48 of 2002. To mark the documents, proper permission should have been sought and granted by the Court. But the respondent had not sought such permission from the Trial Court. When such permission had not been sought from the trial Court, the First Appellate Court should not have embarked on a roving exercise to direct the District Munsif to mark those documents which according to the First Appellate Court was already on record.



36. I hold that the said observation by the First Appellant Court. The documents were not on record. The plaint in O.S.No. 48 of 2002 had been withdrawn. The plaintiff had taken a conscious decision to withdraw the plaint and since the plaint and the documents form one set called pleadings, the documents are also withdrawn. If the First Appellate Court was of the opinion that opportunity should have been granted to mark those documents, then, the First Appellate Court should have directed that necessary application should have been filed under Order 41 Rule 27 to produce as evidence those documents and then proceed to decide the matter on merits, taking upon itself, to issue directions to mark documents. Issue directions to the District Munsif to mark documents without proper application is extremely unwarranted and calls for interference by this Court.

37. The learned counsel for the respondent however pointed out that the directions have been confined in a narrow corridor wherein the First Appellate Judge had only stated that the documents already filed along with O.S.No. 48 of 2002 should alone be marked and evidence should be confined only to those documents and cross examination should also be confined to those documents and therefore by limiting the scope of recording of evidence, no prejudice can be caused to the appellant herein.

38. I hold that the First Appellate Court should have confined itself to the materials available on record and should have proceeded to delivery Judgment on those materials.

39. Section 3 of the Evidence Act speaks of the terms 'proof' 'disprove' and 'not proved'. Proof of any fact is on the basis of the materials available on the records of the Court. The Court cannot go beyond that and enter into a fishing exercise and direct examination of records which are not available on record. Such a direction has to be interfered with.

40. The learned counsel for the respondent herein relied on (2010) 13 SCC 487 [Malayalam Plantations Limited., Vs. State of Kerala and Another]. The Hon'ble Supreme Court had considered an application filed under Order 41 Rule 27 CPC, for adjudication of additional evidence before the Appellate Court. The Hon'ble Supreme Court had stated that such an application should be considered on merits and should be allowed in the interest of justice. It had also been stated that where the production of additional evidence is sought, the duty of the High Court was to deal with the same on merits. It was stated that at the same time of hearing the appeal on merits, it has to be determined whether the documents sought to be produced are required for adjudication of any relief. It was held as follows:



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"14. We are not inclined to go into the validity or acceptability of those documents/materials filed by both sides before the High Court. Order 41 CPC speaks about procedure in respect of disposal of appeals from the original decree. Among various rules, we are concerned with Rule 27 which reads as under:

"27. Production of additional evidence in appellate court.-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But if-

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the appellate court may allow such evidence or document to be produced or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an appellate court, the court shall record the reason for its admission."

15. In view of the above provision, in our opinion, when an application for reception of additional evidence under Order 41 Rule 27 CPC was filed by the parties, it was the duty of the High Court to deal with the same on merits. The above principle has been reiterated by this Court in *Jatinder Singh v. Mehar Singh* [(2009) 17 SCC 465 : AIR 2009 SC 354] and *Shyam Gopal Bindal v. Land Acquisition Officer* [(2010) 2 SCC 316] .



the High Court to consider and take a decision one way or the other as per the mandate of the said provision. "

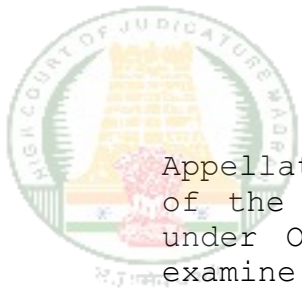
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41. The facts in the instant case are distinguishable and different. In the case before the Hon'ble Supreme Court, an application under Order 41 Rule 27 CPC was actually presented seeking permission to file additional documents before the First Appellate Court herein. In the instant case, no such application was ever filed. There were no documents on record. The First Appellate Court had erred in directing the Munsif Court to mark the documents which had already been withdrawn by the plaintiff.

42. The issue of Order 41 Rule 27 CPC should not have come into consideration by the First Appellate Court. Even before this Court an application under Order 41 Rule 27 has not been filed. The Judgment referred which provides the basis or the circumstances under which an application under Order 41 Rule 27 CPC is to be allowed, is not applicable at all to the facts of this case since such an application had not been filed by the respondent herein either before this Court or before the First Appellate Court.

43. The learned counsel for the appellant relied on 2007 (3) CTC 383 [Arockiaprakash Vs. Rangasamy], paragraph Nos. 9 and 10:-

"9. The catena of judgments reiterate the following principles of law that the order of remand cannot be passed by the Appellate Court as a matter of course. Remand is permissible only when the Appellate Court in the interest of justice feels that the remand is just and appropriate and that the Appellate Court should arrive at a specific finding on the materials available on record that the judgment of the Trial Court is erroneous and liable to be set aside, which is a conditional precedent. The Appellate Court should not remand the case on the ground that the evidence is not properly assessed. Order of remand should not be made when the defect in the proceeding has been due to negligence or default of the party, who will benefit by the remand. The order of remand should not be made to fill up a lacuna by allowing the party to adduce evidence. If it



Appellate Court has to proceed with the said appeal on the basis of the materials available on record. Only if an application under Order 41 Rule 27 CPC is filed, can the Appellate Court examine whether further documents are required to adjudicate the issues before it and thereafter proceed to determine the scope of the appeal and if it determined that the documents are required for a just determination of the suit, permit marking of such documents. Otherwise the First Appellate Court should decide the appeal only on the basis of the records.

47. In view of the aforesaid reasoning, the order of remand is set aside. This Civil Miscellaneous Appeal is allowed. The First Appellate Court is directed to dispose of A.S.No. 33 of 2017 on the basis of the materials available on the record and proceed to deliver a Judgment. The Judgment dated 06.08.2018 made in A.S.No. 33 of 2017 remanding, O.S.No. 68 of 2008 for fresh consideration by marking documents is set aside and a direction is given to the Sub Court, Conoor, to take A.S.No. 33 of 2017 on file and proceed to hear the rival contentions on the basis of the documents and materials available on record. The direction to remand the suit for marking documents is specifically set aside. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS-VI)

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Sub Assistant Registrar

vsg

To

1. The Subordinate Judge, Conoor.
2. The District Munsif, Kotagiri.
3. The Section Officer,
V.R.Section,
Madras High Court, Chennai.

+1cc to M/s.Sarvabhauman Associates, Advocate, S.R.No.20479

+1cc to M/s.Naveen Kumar Murthi, Advocate, S.R.No.20309

C.M.A.No.2189 of 2018

And

C.M.P.No.17054 of 2018

KK(CO)

RLP(18/05/2022)