



S.A.(MD)No.37 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 17.04.2023

CORAM:

THE HONOURABLE **MR.JUSTICE ABDUL QUDDHOSE**

S.A.(MD)No.37 of 2019

and

C.M.P.(MD)Nos.1585 and 1586 of 2019

1.Ramiah

2.Ramkumar

... Appellants

/Vs./

1.Selvi.Monika

2.Anantha Babu

3.Thamil Selvan

... Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code to set aside the judgment and decree passed in A.S.No.20 of 2015, on the file of the Sub Court, Padmanabapuram, dated 12.12.2018 reversing the judgment and decree passed in O.S.No.170 of 2010 on the file of the Principal District Munsif Court, Padmanabapuram, dated 21.11.2014 by allowing this Second Appeal.



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For Appellants : Mr.V.Meenakshisundaram

For Respondents : Mr.S.C.Herold Singh

JUDGMENT

This second appeal was admitted by this Court on 14.03.2023 by formulating the following substantial questions of law:

"1) When Ex.A1, dated 19.12.1997, has recitals to the effect that the disposition is to take effect on the death of the executant and his wife, whether the lower appellate Court is correct in construing the document dated 19.12.1997 as a settlement deed?

2) Whether the first appellate Court is correct in allowing the appeal in A.S.No.20 of 2015 on merits when the appellants herein were set ex parte before the first appellate Court as against the Order 41 Rule 17(2) of C.P.C.?"

2. This second appeal has been filed challenging the judgment and decree of the lower appellate Court, namely, Sub Court, Padmanabapuram, dated 12.12.2018 passed in A.S.No.20 of 2015. The appellants are the defendants in the suit in O.S.No.170 of 2010 on the file of the Principal District Munsif Court, Padmanabapuram. The suit was



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filed for declaration that the cancellation of the settlement deed dated 31.12.2009 and the consequential sale deed dated 31.12.2009 are null and void. The said suit was dismissed by the trial Court. Aggrieved by the same, the respondents / plaintiffs filed the first appeal. The lower appellate Court reversed the findings of the trial Court and allowed the first appeal filed by the respondents / plaintiffs and the relief sought for in the plaint was granted. Aggrieved by the same, this second appeal has been filed by the defendants in the suit.

3. Even though this Court has formulated two substantial questions of law as extracted supra, while admitting the second appeal, this Court, after perusing the original records from the lower appellate Court notices the following:

(a) The hand delivered summons, which is alleged to have been served on the appellants / defendants, namely, Ramiah and Ramkumar on 03.04.2015 contains the signature of Ramiah and Ramkumar, which is completely different from the signature found in the written statement filed by them before the trial Court. The Court post notice sent by the respondents / plaintiffs before the lower appellate Court to the



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appellants / defendants, Ramiah and Ramkumar has however been returned with an endorsement of 'not known', despite the fact that the notice was sent to the very same address, as it was the address, where the Court bailiffs are said to have served the hand delivered summons to Ramiah and Ramkumar, the appellants / defendants.

4. Even though the learned counsel appearing for the appellants / defendants, has raised the substantial questions of law and this Court had also admitted the second appeal by formulating the substantial questions of law referred to supra, this Court is not deciding the same now. But, in view of the fact that the summons in the lower appellate Court proceedings has not been served on the appellants / defendants, this Court is constrained to formulate the following substantial question of law, in lieu of earlier once formulated on 14.03.2023:-

(a) Whether the appellants / defendants were duly served in the lower appellate proceedings in A.S.No.20 of 2015 on the file of the Sub Court, Padmanabapuram?



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5. As seen from the immaterial records produced from the lower appellate Court, it is clear that the appellants / defendants were not served in the lower appellate Court proceedings for the following reasons:

(a) Even though the trial Court Advocate of the appellants / defendants had undertaken to file vakalat on behalf of the appellants / defendants before the lower appellate Court, he did not file the same.

(b) The appellants / defendants categorically contend that they were not aware of the appellate Court proceedings and they did not engage the trial Court Advocate to appear on their behalf in the lower appellate Court proceedings;

(c) The Court postal notice sent by the lower appellate Court to the appellants / defendants has also been returned with an endorsement 'not known'. However, the hand delivered summons served by the Court bailiff discloses that the appellants / defendants have received the summons in the lower appellate Court proceedings, which contradicts the Court postal notice issued by the lower appellate Court, which has been returned unserved for the reason 'not known'. Admittedly, the only



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address disclosed by the appellants / defendants before the trial Court is the address, to which summons was attempted to be served by the lower appellate Court. While that be so, there cannot be two different endorsements, (a)where the Court postal notice has been returned unserved with an endorsement 'not known' and (b)where the Court bailiff has made an endorsement that the 'summons has been served on the appellants / defendants';

(d) The signature found in the written statement of the appellants / defendants before the trial Court and the signature found in the report submitted by the Court bailiff, which contains the alleged signature of the appellants / defendants are totally different to the naked eye. Therefore, it can be presumed that the appellants / defendants never signed the report of the Court bailiff.

6. For the foregoing reasons, for the effective adjudication of the first appeal, namely, A.S.No.20 of 2015, the matter will have to be remanded back to the lower appellate Court for fresh consideration on merits and in accordance with law, as the appellants / defendants were not served with the notice in the lower appellate Court proceedings.



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7. The substantial question of law formulated by this Court today for admitting the second appeal has been answered in favour of the appellants / defendants by setting asiding the Judgment and decree of the lower appellate Court dated 12.12.2018 passed in A.S.No.20 of 2015 on the ground that the appellants / defendants have not received notice in A.S.No.20 of 2015. Accordingly, the judgment and decree of the lower appellate Court, namely, the Sub Court, Padmanabapuram in A.S.No.20 of 2015 dated 12.12.2018 is hereby set aside and the matter is remanded back to the very same Court for fresh consideration on merits and in accordance with law, after affording a fair hearing to the appellants / defendants as well as the respondents / plaintiffs.

8. The lower appellate Court, namely, the Sub Court, Padmanabapuram is directed to dispose of the first appeal in A.S.No.20 of 2015 within a period of four months from the date of receipt of a copy of this Judgment. However, since the respondents / plaintiffs had earlier succeeded before the lower appellate Court, both the parties are directed to maintain status quo, till the first appeal in A.S.No.20 of 2015 is finally disposed of by the lower appellate court, as directed by this Court.



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9. This Second Appeal is allowed accordingly. Consequently, connected Miscellaneous Petitions are closed.

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Index : Yes / No
NCC : Yes / No
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TO:

- 1.The Sub Court, Padmanabapuram.
- 2.The Principal District Munsif Court, Padmanabapuram.
- 3.The Section Officer,
VR Section, Madurai Bench of Madras High Court,
Madurai.



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ABDUL QUDDHOSE, J.

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Judgment made in
S.A.(MD)No.37 of 2019

Dated:
17.04.2023