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S.A.No.641 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **07.06.2024**

CORAM

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

S.A.No.641 of 2021

Gnanavel

... Appellant

Vs.

Velu

... Respondent

PRAYER: Second Appeal filed under Section 100 of Code of Civil Procedure, 1908 against the Judgment and Decree in A.S.No.83 of 2018 dated 28.02.2019 on the file of the Sub Court, Ulundurpet in partly allowing the appeal as against the Judgment and Decree in O.S.No.56 of 2013 dated 28.11.2013 on the file of the Principal District Munsif Court, Ulundurpet.

For Appellant : Mr.M.Himavanth

For Respondent : Mr.M.Muruganantham

JUDGMENT

This Second Appeal was admitted by this Court on 26.08.2021 by formulating the following substantial questions of law:



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" 1. *Whether the judgment of the lower appellate Court in decreeing the suit by placing reliance on the additional evidence Exs.A7 & A8 under Order XLI Rule 27 without following the procedure envisaged under Order XLI Rule 28 and 29 of Code of Civil Procedure, 1908 is justified?*

2. *Whether the document namely Sale Receipt, additional evidence under Ex.A7 can be construed as "Sale" as defined under Section 54 of the Transfer of Property Act, 1882 to confer title on the plaintiff?"*

2. The appellant is the defendant in the suit. The respondent is the plaintiff. The suit O.S.No.56 of 2013 was filed by the respondent against the appellant on the file of the Principal District Munsif Court, Udumalpet, seeking for declaration and injunction. The respondent sought to declare that he is the absolute owner of the suit schedule properties which comprises of two items. The appellant remained *ex-parte* in the said suit. The Trial Court by its Judgment and Decree dated 28.11.2013 passed in O.S.No.56 of 2013 dismissed the suit filed by the respondent on the ground that he has not proved his title over the suit schedule properties. Aggrieved by the same, the respondent preferred first appeal in A.S.No.83 of 2018 before the Sub



Court, Udumalpet.

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3. In the first appeal, the appellant entered appearance though he had remained *ex-parte* before the Trial Court. The respondent filed an application under Order XLI Rule 27 C.P.C., seeking leave of the lower Appellate Court for receiving additional documents viz.,

a) sale letter issued by the respondent's father in favour of the respondent; and

b) extract from A-Register standing in the name of the respondent for item No.2 of the suit schedule properties.

4. The appellant contested the appeal and disputed that the respondent is the owner of the suit schedule properties and has also disputed the documents produced by the respondent both before the Trial Court as well as the lower Appellate Court. However, the lower Appellate Court allowed the application filed by the respondent under Order XLI Rule 27 of C.P.C. and received the additional documents and held those documents admissible in evidence. Based on the documents produced by the respondent, which were marked as exhibits before the Trial Court and the additional documents which were marked as Exs.A7 and A8 before the



lower Appellate Court. The lower Appellate Court partly decreed the suit as prayed for by the respondent in the suit by granting the relief of declaration and injunction in favour of the respondent in respect of item No.2 of the suit schedule properties alone, but rejected the declaration and injunction relief in so far as item No.1 is concerned.

5. Admittedly, no appeal has been filed by the respondent, aggrieved by the rejection of the declaration and injunction relief in so far as item No.1 of the suit schedule properties is concerned. The present appeal has been filed only by the defendant who is aggrieved by the grant of the declaration and injunction relief in favour of the respondent in respect of item No.2 of the suit schedule properties.

6. The learned counsel for the appellant drew the attention of this Court to the impugned Judgment and Decree of the lower Appellate Court and would submit that Order XLI Rules 28 and 29 of C.P.C. have not been followed by the lower Appellate Court which is mandatory. According to him, Order XLI Rule 27 C.P.C. enables the lower Appellate Court to grant leave to the appellant to file additional documents. According to him, once



leave is granted by the lower Appellate Court under Order XLI Rule 27 C.P.C., the mandatory procedure contemplated under Order XLI Rules 28 and 29 C.P.C. have to be followed. According to him, once 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.

7. The learned counsel for the appellant would also submit that under Order XLI Rule 29 C.P.C., where additional evidence is allowed to be taken, the appellate Court shall specify the points to which the evidence are to be confined with and record on its proceedings the points so specified. Referring to the impugned judgment and decree of the lower appellate Court, the learned counsel for the appellant would categorically submit that the lower appellate Court has not followed the mandatory procedure as contemplated under Order XLI Rules 28 and 29 C.P.C. as no opportunity was granted for the appellant to disprove the veracity and admissibility of the documents by allowing him to cross examine the respondent / plaintiff with regard to the admissibility, proof and relevancy of the documents which



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have been allowed to be received as additional documents by the lower Appellate Court under Order XLI Rule 27 C.P.C. He would also submit that one of the documents allowed to be received is a sale letter which is an unregistered document and is inadmissible in evidence. But, according to him, despite the same, the lower appellate Court has relied upon the said document and has partly decreed the suit. He would also submit that Ex.A1 filed by the respondent / plaintiff before the Trial Court is only Chitta and not Natham Patta as claimed by the plaintiff and without granting any opportunity for the appellant / defendant to dispute the same and raise objections, the lower appellate Court has partly decreed the suit in favour of the respondent / plaintiff.

8. The learned counsel for the appellant would therefore submit that by total non application of mind and contrary to settled law by not following the procedure established under Order XLI Rules 28 and 29 of C.P.C., the lower appellate Court has passed the impugned Judgment and Decree and therefore, he seeks for setting aside the impugned Judgment and Decree of the lower Appellate Court and to remand the matter back to the Trial Court for fresh consideration on merits and in accordance with law, after affording



an opportunity for the appellant / defendant to file his written statement within a time frame to be fixed by this Court.

9. On the contrary, the learned counsel for the respondent / plaintiff would submit that even before the Trial Court, the respondent / plaintiff had filed a document of title viz., Natham Patta for the item No.2 in the suit schedule properties and therefore, the lower appellate Court was correct in partly decreeing the suit in favour of the respondent / plaintiff in respect of item No.2 of the suit schedule properties.

10. In support of his submission that Ex.A1 is a document of title, the learned counsel for the respondent drew the attention of this Court to a Single Bench Judgment of this Court in the case of ***Poochi Servai (died) and Others Vs. Rajendaran and Others*** reported in ***2019 (2) Mad LJ 148***. Relying upon the said decision, he would submit that Natham Patta is a document of title and in particular he referred to paragraph No.12 of the said decision, which has held that Natham Patta is a document of title. Therefore, he would submit that the lower appellate Court has rightly partly decreed the suit in so far as item No.2 of the suit scheduled properties is concerned in



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favour of the respondent / plaintiff. According to him, irrespective of Exs.A7 and A8 which are the documents allowed to be received by the lower appellate Court and marked as exhibits by the lower appellate Court, the respondent / plaintiff has proved his title over item No.2 of the suit schedule properties. He also drew the attention of this Court to the impugned judgment and decree of the lower appellate Court and would submit that the lower appellate Court relied upon Ex.A1 and only thereafter, has partly decreed the suit in favour of the respondent / plaintiff in so far as item No.2 of the suit schedule properties is concerned by reversing the findings of the Trial Court which had dismissed the suit in entirety.

11. Learned counsel for the respondent / plaintiff would further submit that since an appeal is a continuation of suit, the appellant / defendant who did not file written statement before the Trial Court, the Order XLI Rules 28 and 29 of C.P.C. is not applicable. He would also contend that the counter filed by the appellant / defendant in the Order XLI Rule 27 C.P.C. application seeking leave of the Court for reception of additional documents cannot also be construed to be pleadings satisfying the requirements of Order VI C.P.C.. The learned counsel for the respondent /



plaintiff would submit that since the appellant / defendant did not diligently participate in the trial proceedings cannot avail the benefit of Order XLI Rules 28 and 29 C.P.C. because it is only an extension of trial proceedings.

Discussion:

12. There is absolutely no doubt on the legal proposition that an appeal is a continuation of the suit. But, in the case on hand, the suit was dismissed and the Trial Court judgment was an *ex-parte* judgment. The appellant / defendant participated only in the appeal proceedings viz., in A.S.No.83 of 2018. The Court had an occasion to consider the defences raised by the appellant / defendant for the first time only in the first appeal i.e., in A.S.No.83 of 2018. Therefore, the contention of the respondent / plaintiff before this Court that Order XLI Rules 28 and 29 C.P.C. cannot be relied upon by the appellant / defendant has to be rejected. The lower appellate Court under the impugned judgment and decree having received the additional documents filed by the appellant / defendant under Order XLI Rule 27 C.P.C. ought to have set aside the judgment and decree of the Trial Court and remanded the matter back to the Trial Court for re-trial giving a direction to the Trial Court to pass a judgment and decree after giving due



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consideration to the documents already marked as exhibits as well as the additional documents received under Order XLI Rule 27 C.P.C. subject to its admission, proof and relevancy.

13. It is evident from Order XLI Rules 27, 28 and 29 C.P.C., that the procedure to be mandatorily followed by the appellate Court for receiving additional evidence in the appeal are as follows:

a) Order XLI Rule 27 C.P.C. empowers the Court to grant leave to receive additional evidence subject to the satisfaction of certain conditions imposed therein;

b) Allowing the application under Order XLI Rule 27 C.P.C., will not amount to the admissibility of the additional documents as a piece of evidence;

c) Order XLI Rule 28 C.P.C. is the next step for proving the admissibility and relevancy of the additional documents. As per Order XLI Rule 28 C.P.C., wherever additional evidence is allowed to be produced under Order XLI Rule 27 C.P.C., the appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or in any of the subordinate Court to take such evidence and to send it when



taken to the appellate Court. It is clear from the said provision that either the appellate Court is empowered to record the evidence by itself or send it to the Trial Court for recording the evidence;

d) Order XLI Rule 29 C.P.C. also makes it clear that when additional evidence is directed or allowed to be taken, the appellate Court shall satisfy the points to which the evidence are to be confined with and record on its proceedings, the points so specified.

14. In the case on hand, as seen from the impugned Judgment and Decree of the lower appellate Court, it is clear that the mandatory procedure contemplated under Order XLI Rules 28 and 29 C.P.C. have not been adhered to. The lower appellate Court has received additional documents viz., Exs.A7 and A8 and has also treated the said documents as an admissible piece of evidence without granting an opportunity for the appellant / defendant to disprove its admissibility, proof and relevancy. If Order XLI Rules 28 and 29 C.P.C. were followed, the appellant / defendant would have been granted the opportunity to raise objections and disprove the additional documents filed by the respondent / plaintiff before the lower appellate Court viz., Exs.A7 and A8.



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15. By total non application of mind to Order XLI Rules 28 and 29 C.P.C., the lower appellate Court has treated the additional documents filed by the respondent / plaintiff as an admissible piece of evidence and has considered those documents along with other documents filed before the Trial Court and has erroneously partly decreed the suit by granting the declaration and injunction reliefs in favour of the respondent / plaintiff in so far as item No.2 of the suit schedule properties is concerned.

16. Though the learned counsel for the respondent / plaintiff would contend that even without the additional documents, viz., Exs.A7 and A8, the respondent / plaintiff has proved his title from Ex.A1 (natham patta), the said contention cannot also be accepted by this Court for the following reasons:

a) Admittedly, the suit filed by the respondent / plaintiff before the Trial Court was dismissed. Though the appellant / defendant remained *ex-parte* in the suit, the Trial Court was not satisfied with the evidence placed on record by the plaintiff, as according to the Trial Court, the plaintiff has not established that he is the owner of the suit schedule properties;



b) Ex.A1, alleged to be natham patta by the respondent / plaintiff, is disputed by the learned counsel for the appellant as he would contend that it is only a Chitta and not Patta;

c) The objections raised by the appellant, with regard to the documents produced by the respondent / plaintiff and marked as exhibits both before the Trial Court as well as the lower appellate Court, have not been considered on merits by granting an opportunity to the appellant to disprove the authenticity, veracity and admissibility of the documents through oral and documentary as well as through cross examination of the respondent's / plaintiff's witness.

17. The case on hand is a fit case for remanding back to the Trial Court for fresh consideration on merits and in accordance with law. It is clear from the impugned Judgment of the lower appellate Court as disclosed supra that the mandatory procedure contemplated under Order XLI Rules 28 and 29 of C.P.C. while receiving additional documents have not been followed.

18. The lower appellate Court has also accepted that Exs.A7 and A8



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are admissible piece of evidence and based on those documents as well as the other documents marked as exhibits before the Trial Court has erroneously without following the mandatory procedure contemplated under Order XLI Rules 28 and 29 C.P.C. has partly decreed the suit by granting the declaration and injunction relief in favour of the respondent / plaintiff in respect of item No.2 of the suit schedule properties without granting an opportunity for the appellant / defendant to disprove the documents. Eventhough, the respondent / plaintiff had sought declaration and injunction reliefs in respect of two items and the lower appellate Court had only partly decreed the suit by granting reliefs only in respect of item No.2 alone, it is surprising as to why no appeal has been filed by the respondent / plaintiff for the rejection of the relief by the lower appellate Court in so far as item No.1 of the suit schedule properties is concerned. All these factors have to be necessarily gone into in depth and only if opportunity is granted to the appellant to file a written statement disputing the contentions of the respondent / plaintiff, truth can be unearthed based on the pleadings and evidence available on record.

19. It is also to be noted that the documents marked as exhibits on the



side of the respondent / plaintiff cannot also be treated on the face of it to be genuine documents. Necessarily, only through oral and documentary evidence let in by both the parties, the genuineness of those documents can be ascertained. Therefore, though the learned counsel for the respondent / plaintiff would oppose for a direction from this Court for remanding the matter back to the Trial Court for fresh consideration and permitting the appellant / defendant to file written statement, this Court rejects the said objection, since, admittedly, the suit was dismissed and only in the lower appellate Court, the findings of the Trial Court were reversed partly by granting relief in favour of the respondent / plaintiff in respect of item No.2 of the suit schedule properties.

20. Order XLI of the Code provides for appeals from original decrees. The code empowers the appellate Court to order remand in three situations. These three situations are covered by Order XLI Rule 23, Order XLI Rule 23A and Order XLI Rule 25 of the Code which reads as under:

"23. Remand of case by Appellate Court.—Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may,



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if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

23A. Remand in other cases.—*Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.*

25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.—*Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the*



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appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor [within such time as may be fixed by the Appellate Court or extended by it from time to time]. "

21. Order XLI Rule 23 is invocable by the appellate Court where the appeal has arisen from the decree passed on a preliminary point. In other words, where the entire suit has been disposed of by the Trial Court on a preliminary point and such decree is reversed in appeal and the appellate Court thinks it proper to remand the case for fresh disposal. While doing so, the appellate Court may issue further direction for Trial of certain issues.

22. Order XLI Rule 23 A has been inserted in the Code by Act 104/1976 with effect from February 1st, 1977. According to Order XLI Rule 23 A of the Code, the appellate Court may remand the suit to the Trial Court eventhough such suit has been disposed of on merits. It provides that while the Trial Court has disposed of the suit on merits and the decree is reversed in appeal and the appellate Court considers that re-trial is necessary, the



appellate Court may remand the suit to the Trial Court.

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23. In so far as Order XLI Rule 25 of the Code is concerned, the appellate Court continues to be in *seisin* of the matter. It calls upon the Trial Court to record the findings on some issue or issues and send their findings to the appellate Court. The power under Order XLI Rule 25 is invoked by the appellate Court where it holds that the Trial Court that passed the decree omitted to frame or try any issue or determine any question of fact essential to decide the matter finally. The appellate Court while remitting some issue or issues may direct the Trial Court to take additional evidence on such issue / issues.

24. In the case on hand, the Trail Court had dismissed the suit after the defendant was set *ex-parte*. However, the first appellate Court had partly allowed the appeal filed by the plaintiff by granting decree in favour of the plaintiff in respect of second item of the suit schedule properties. As discussed supra, the mandatory procedure contemplated under Order XLI Rules 28 and 29 C.P.C. were not followed by the lower appellate Court after allowing the application filed by the plaintiff under Order XLI Rule 27 C.P.C. permitting reception of additional documents filed by the plaintiff



viz.,

- a) sale letter issued by the plaintiff's father in favour of the plaintiff; and
- b) extract from A-Register standing in the name of the plaintiff for item No.2 of the suit schedule properties.

25. The lower appellate Court has also marked the aforesaid additional documents as exhibits on the side of the plaintiff viz., Exs.A7 and A8 and has held those documents admissible as a piece of evidence without granting an opportunity for the defendant to cross examine the plaintiff's witness with regard to the admissibility, proof and relevancy of those documents. The lower appellate Court has neither recorded oral evidence of the plaintiff with regard to the additional documents by itself nor has it remanded the matter to the Trial Court for recording of additional evidence as contemplated under Order XLI Rule 28 C.P.C.

26. The contentions of the defendant placed before the lower appellate Court were never brought to the notice of the Trial Court and the said contentions cannot also be discarded without any oral evidence and it is therefore just necessary that those contentions are also required to be



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adjudicated by the Trial Court on merits and in accordance with law but the Trial Court judgment has not considered the same in view of the fact that the defendant was set *ex-parte* by the Trial Court and the suit filed by the plaintiff also came to be dismissed by an *ex-parte* judgment.

27. For the foregoing reasons, the Substantial Questions of Law framed by this Court while admitting the second appeal are answered in favour of the appellant by holding that the lower appellate Court has not followed the procedure contemplated under Order XLI Rules 28 and 29 C.P.C. and the documents viz., Exs.A7 and A8 received by the lower appellate Court were erroneously held to be admissible as a piece of evidence without granting an opportunity for the appellant to rebut those documents through oral and documentary evidence and that too despite the fact that the sale receipt (Ex.A7) is an unregistered document.

28. For the foregoing reasons, necessarily, re-trial by the Trial Court is required for the effective adjudication of the suit. In view of the same, the impugned judgment of the lower appellate Court has to be set aside and matter has to be remanded back to the Trial Court for fresh consideration on



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merits and in accordance with law after conducting a fresh re-trial.

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29. In the result, the impugned judgment and decree of the Lower Appellate Court passed in A.S.No.83 of 2018 dated 28.02.2019 is hereby set aside and the second appeal is disposed of by remanding the matter back to the Trial Court viz., Principal District Munsif Court, Ulundurpet, for fresh consideration on merits and in accordance with law. The appellant / defendant is directed to file his written statement within a period of three weeks from the date of receipt of a copy of this Judgment. On receipt of the written statement, the Trial Court shall frame issues within a period of two weeks thereafter. After framing issues as directed by this Court, the Trial Court after recording the oral and documentary evidence of both the plaintiff and the defendant, is also directed to permit the parties to file additional documents if required and pass a judgment and decree within a period of four months from the date of framing of issues. No Costs.

07.06.2024

Index : Yes/No
Speaking Order : Yes / No
Neutral Citation Case: Yes / No
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ABDUL QUDDHOSE. J.,

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To

1. The Sub Court, Ulundurpet.
2. The Principal District Munsif Court, Ulundurpet.
3. The Section officer, Record Section, High Court of Madras.

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