



S.A.No.29 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.06.2024

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

S.A. No.29 of 2021

M.Sathya

.. Appellant

vs.

1.S.Prabakaran

2.K.Indira

3.K.Gopi

.. Respondents

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code, 1908 against the judgment and decree dated 10.01.2020 in A.S. No.48 of 2017 on the file of the Sub Court, Tiruppattur, Vellore District, reversing the judgment and decree dated 07.11.2016 in O.S. No.138 of 2015 on the file of the District Munsif Court, Tiruppattur, Vellore District.

For Appellant

: Mr.K.Selvaraj

For Respondents

: Mr.S.Ramajayam for R1
R2 & R3-No appearance

JUDGMENT



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This Second Appeal has been filed by the third defendant in the suit O.S. No.138 of 2015 on the file of the District Munsif Court, Tiruppattur, Vellore District, challenging the judgment and decree passed by the Lower Appellate Court, i.e. the Sub Court, Tiruppattur in A.S. No.48 of 2017.

2.The appellant is the third defendant in the suit. The first respondent is the plaintiff. The respondents 2 and 3 are the defendants 1 and 2 in the suit.

3.In the forthcoming paragraphs, the parties are described as per the litigative status in the suit.

4.The suit O.S. No.138 of 2015 on the file of the District Munsif Court, Tiruppattur, Vellore District was filed by the plaintiff against the defendants seeking for a permanent injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the suit schedule property. The plaintiff purchased the suit schedule property from the defendants 1 and 2 under a Sale Deed dated 13.09.2012.



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According to the plaintiff, pursuant to the said Sale Deed, he is the absolute owner of the suit schedule property.

5.It is the contention of the third defendant, who is the appellant herein that the property settled in favour of the third defendant has been sold by the defendants 1 and 2 to the plaintiff. The plaintiff also claims that he is the bonafide purchaser, having paid valuable sale consideration to the defendants 1 and 2.

6.Based on the pleadings of the respective parties, the Trial Court, i.e. the District Munsif Court, Tiruppattur, Vellore District in O.S. No.138 of 2015 framed the following issues:

a)Whether the plaintiff is an absolute owner of the suit schedule property?

b)Whether the plaintiff is entitled for permanent injunction as prayed for in the suit?

c)To what other reliefs?

7.The Trial Court, by its judgment and decree dated 07.11.2016 passed in O.S. No.138 of 2015, dismissed the suit filed by the plaintiff on



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the ground that he has not proved that he is in possession of the suit schedule property. In the suit, all the defendants had remained exparte and it was an exparte judgment. Aggrieved by the judgment and decree dated 07.11.2016 passed in O.S. No.138 of 2015, the plaintiff filed a First Appeal before the Sub Court, Tiruppattur, Vellore District in A.S. No.48 of 2017. During the pendency of the appeal, the plaintiff filed an application under Order XLI Rule 27 of C.P.C. seeking for reception of the following documents:

- a)Settlement Deed in favour of the first defendant;
- b)Settlement Deed in favour of the second defendant;
- c)Computer patta standing in the name of the plaintiff; and
- d)Another patta standing in the name of the plaintiff.

8.The Lower Appellate Court had allowed the application filed by the plaintiff under Order XLI Rule 27 of C.P.C. and received the additional documents. Even in the First Appeal in A.S. No.48 of 2017, the defendants had remained exparte. By an exparte judgment and decree passed in the First Appeal, the Lower Appellate Court has reversed the findings of the Trial Court by granting the relief of permanent injunction as prayed for by the plaintiff after taking into consideration the additional



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documents, which were allowed to be received by the Lower Appellate Court. Aggrieved by the judgment and decree of the Lower Appellate Court dated 10.01.2020 passed by the Sub Court, Tiruppattur, Vellore District, this Second Appeal has been filed by the third defendant in the suit O.S. No.138 of 2015.

9.Learned counsel for the appellant contended that the Lower Appellate Court has failed to grant an opportunity for the appellant/third defendant to cross examine the plaintiff's witness with regard to the veracity and admissibility of the additional documents, which were allowed to be marked as exhibits by the Lower Appellate Court.

10.Order XLI Rule 27 of C.P.C. is a provision by which any additional documents can be filed in the appeal with the leave of the Appellate Court. Once the additional documents are allowed to be received by the order of the Appellate Court, necessarily, the Appellate Court will have to follow the other provisions, i.e. Order XLI Rule 28 and 29 of C.P.C., which reads as follows:

'28.Mode of taking additional evidence - Wherever additional evidence is allowed to be produced, the Appellate Court may



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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.

29.Points to be defined and recorded - Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined and record on its proceedings the points so specified.'

11.In the instant case, admittedly, the additional documents were allowed to be received only in the Appellate Court and were not marked as exhibits before the Trial Court. Even though the third defendant had remained exparte before the Lower Appellate Court, the Lower Appellate Court atleast ought to have remanded the suit back to the Trial Court by permitting the defendants to cross examine the plaintiff's witness with regard to admissibility, proof and relevancy of the additional documents, which were allowed to be received by the Lower Appellate Court. Order XLI Rule 28 and 29 of C.P.C. are mandatory procedures, which necessarily ought to have been followed.

12.In the case on hand, as seen from the impugned judgment and



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decree of the Lower Appellate Court, the same has not been followed. It

is also to be noted that in the instant case, the suit was dismissed by the Trial Court. Only in the appeal, by considering the additional documents filed by the plaintiff, the findings have been reversed in the absence of the defendants. Since the mandatory procedure as contemplated under Order XLI Rule 28 and 29 of C.P.C. has not been followed by the Lower Appellate Court, necessarily, the judgment and decree passed by both the Courts below have to be set aside by this Court and the matter has to be remanded back to the Trial Court for fresh consideration.

13.However, it is made clear that the appellant/third defendant is not entitled to file his written statement since the same has not been filed earlier. Despite the receipt of suit summons from the Trial Court, no application was filed seeking for condonation of delay in filing the written statement also. The only liberty that can be granted to the appellant/third defendant is to permit him to cross examine the plaintiff's witness with regard to admissibility, proof and relevancy of the documents, which are allowed to be marked as exhibits by the Lower Appellate Court under the impugned judgment and decree passed by the Lower Appellate Court. It is made clear that since the appellant/third



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defendant was set exparte both before the Trial Court as well as the Lower Appellate Court earlier, he is not entitled to let in oral evidence and he is entitled only to cross examine the plaintiff's witness with regard to admissibility, proof and relevancy of the documents filed by the plaintiff.

14.In order to expedite the resolution of the dispute between the parties and in view of the fact that this Court is remanding the matter back to the Trial Court, in the interest of both the parties, this Court deems it fit to direct the Trial Court to dispose of the suit within a time frame to be fixed by this Court.

15.For the foregoing reasons, this Second Appeal is admitted on the following substantial question of law:

Whether the Lower Appellate Court has committed error by not following the procedure contemplated under Order XVI Rule 28 and 29 of C.P.C.?

16.For the reasons stated supra, this Court answers the substantial question of law in favour of the appellant/third defendant by holding that



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the Lower Appellate Court has not followed the mandatory procedure as contemplated under Order XVI Rule 28 and 29 of C.P.C. by not granting an opportunity to the appellant/third defendant to cross examine the plaintiff's witness with regard to admissibility, proof and relevancy of the additional documents, which were filed by the plaintiff before the Lower Appellate Court and allowed to be received under Order XVI Rule 27 of C.P.C. and the Lower Appellate Court has also relied upon the same for the purpose of reversing the findings of the Trial Court.

17.In the result, the judgment and decree passed by both the Courts below are set aside and the matter is remanded back to the Trial Court to dispose of the suit within a period of six months from the date of receipt of a copy of this judgment.

ABDUL QUDDHOSE, J.

vga

18.It is made clear that both the parties shall maintain status quo till the disposal of the suit. No costs.

28.06.2024

vga



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To

- 1.The Sub Court, Tiruppattur,
Vellore District.
- 2.The District Munsif Court,
Tiruppattur, Vellore District
- 3.The Section Officer,
V.R. Section, High Court, Madras.

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