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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 28.03.2024

CORAM:

THE HON'BLE MR. JUSTICE K.K.RAMAKRISHNAN

S.A.(MD).No.301 of 2012
and
M.P.(MD).No.1 and 2 of 2012

Arumuga Pandi

... Appellant/Appellant/Defendant

Vs.

Velchami

... Respondent/Respondent/Plaintiff

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure, praying to pass a judgment and decree setting aside the Judgment and Decree dated 04.03.2005 in A.S.No.34 of 2004 on the file of the Sub Court, Thoothukudi confirming the Judgment and Decree dated 16.12.2003 in O.S.No.266 of 2002 on the file of the Principal District Munsif Court, Thoothukudi.

For Petitioner : Mr.K.Vadivelan

for Ms.K.Mahalakshmi

For Respondent : Mr.Saravanan



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JUDGEMENT

This second appeal filed against the Judgment and Decree dated 04.03.2005 passed in A.S.No.34 of 2004 by the Sub Court, Thoothukudi confirming the Judgment and Decree dated 16.12.2003 passed in O.S.No. 266 of 2002 by the Principal District Munsif Court, Thoothukudi.

2.The defendant in O.S.No.266 of 2002 on the file of the Principal District Munsif Court, Thoothukudi. The respondent filed a suit in O.S.No. 266 of 2022 for declaration and recovery of possession and mandatory injunctions. The said suit was contested by the appellant and the respondent and they disputed the title and also the entitlement of relief claimed by the respondent. The learned trial judge claimed the issues and decreed the suit as per law. The same was challenged by the appeal in A.S. No.34 of 2004 on the file of the Sub Court, Tuticorin. During the pendency of the appeal, according to the appellant, they arrived a settlement on 04.03.2005. On the basis of the same, the learned Sub Court, Tuticorin dismissed the appeal on 04.03.2005. Thereafter, the respondent filed execution petition in E.P.No.



165 of 2005 and also obtained an exparte order of delivery. The appellant herein file an execution application in E.A.No.108 of 2006 in E.P.No.165 of 2005 for setting aside the exparte order of deliver and the same was dismissed. Thereafter, the appellant filed this second appeal challenging the suit and the first appeal.

3. Even though number of the substantial questions were raised by the learned counsel for the appellant, this Court confined the following substantial questions of law:-

3.1. Whether the Court below is correct in dismissing the appeal suit without making the order on merit after recording of the appellant's name?

3.2. Whether the Court below in I.A.No.162 of 2004 in A.S.No.34 of 2004 is correct in dismissing the petition to restore the appeal on file by setting aside the not press memo is sustainable in view of the decision reported in **2006 3 SCC 699?**

4. Earlier on 20.06.2012, this Court passed the following order:-

The appellant is the defendant and a suit filed by the respondent herein in O.S.No.266 of 2002 on the file of the Court of the Principal



District Munsif, Tuticorin, came to be decreed on 25.11.2002. Challenging the vires of the said judgment and decree, the appellant herein has preferred an appeal in A.S.No.34 of 2004 on the file of the Sub-Court, Tuticorin. During pendency of the appeal, on account of the some alleged compromise, the appellant/defendant did not choose to prosecute the appeal and also made an endorsement and subsequently, the appeal came to be dismissed vide judgment and decree dated 04.03.2005. Thereafter, the respondent/decreed holder levied an execution petition in E.P.No.165 of 2005 and also obtained an ex-parte order of delivery. The appellant herein filed an execution application in E.A.No.108 of 2006 in E.P.No.165 of 2005 for setting aside the ex-parte order of delivery and the same was dismissed. Challenging the same, he has preferred a revision in C.R.P.No.920 of 2011.

2.The appellant alleging fraud and misrepresentation, filed an interlocutory application in I.A.No.162 of 2006 in A.S.No.34 of 2004 praying for restoration of the appeal by setting aside the memo dated 19.07.2005, basing



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on which, the appeal came to be dismissed. The said I.A also came to be dismissed on 07.04.2011. The appellant herein feeling aggrieved by the same, preferred a revision in C.R.P.No.1324 of 2011 and on advice, he has not pressed the civil revision petition and thereafter, he filed the present second appeal challenging the vires of the judgment and decree dated 04.03.2005 in A.S.No. 34 of 2004 on the ground of fraud and misrepresentation and also on merits.

3.This Court, After hearing the arguments of the learned counsel for the appellant, is of the view that the present second appela is to be listed along with C.R.P.No.920 fo 2011. Hence, the Registry is directed to post this second appeal along with C.R.P.No.920 of 2011, before the concerned Hon'ble fort-folio Judge, after obtaining appropriate orders.

5.On the basis of the order, the second appeal is still not admitted.

This Court, by order dated 26.03.2024 admitted the second appeal following substantial questions of the law.



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- a) Whether the judgment and decree in O.S.No 480 of 1996 on the file of the Principal District Munsif Court, Thoothukudi and the judgment and decree in A.S.No. 100 of 2000 on the file of the Additional District Judge Cum Chief Judicial Magistrate, Thoothukudi, are binding on the appellant and his vendor Muniyasamy since Arulraj, the plaintiff in O.S.No. 480 of 1996 has already parted his interest in the suit property by executing a registered sale deed in favour of Muniyasamy on 17.11.1995 in Ex.B77
- b) Is the trial Court is correct in not advertng to Ex. XI Jamin patta of Nattar and Ex.BII the patta transfer order and decreeing the suit?
- c) Whether the judgment of the trial Court placing reliance on the judgment and decree in O.S.No. 480 of 1996 in rejecting the claim of the appellant on the ground that the title of his predecessor in title has been negatived and applying the principal or rejudicata is not perverse?



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- d) Whether the fair order and decreetal order of the first appellate Court in I.A.No. 162 of 2004 in A.S.No.34 of 2004 dismissing the petition to restore the appeal on file by setting aside the not press memo is sustainable in view of the decision reported in 2006(3) SCC 699.
- e) Whether the trial Court is correct in basing reliance on the suit and evidence of Arulraj, the predecessor in title of the plaintiff that has been filed and adduced in O.S.No.480 of 1996 on the file of the learned Principal District Munsif Court, Thoothukudi, when he has no title or interest on the date of the suit in the suit property in view of Section 18 of evidence Act?
- f) Is it correct to apply the principles of res judicata against the appellant/defendant in the suit based on the decree in O.S.No.480 of 1996 on the file of the learned Principal District Munsif Court, Thoothukudi when the plaintiff therein has parted his interest in the suit property prior to the institution of the said suit in O.S.No. 480 of 1996 in favour of one Muniyasamy, the predecessor in title of the plaintiff?



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6.The learned counsel appearing for the appellant submitted that there was no final adjudication in the first appeal and the appellant not pressed the first appeal and they entered into compromise as per terms. Subsequently, the respondent estopped from the adhere direction of the compromise. Hence, he seeks for remand of the matter back to the first appellate Court to decide the issue on merits.

7.The learned counsel appearing for the respondent submitted that even though there was no adjudication on merit, but the conduct of the respondent to be considered in this case. Hence, once the appeal is withdrawn, then the finding of the trial court is merged with. Hence, due to the merge of the case, the finding of trial court to be considered and this Court has power to consider the second appeal on merits. Hence, he seeks to dismiss this appeal.

8.This Court considered the rival submissions made on either side and perused the records.



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9. From the records, it is clear that after the judgment and decree passed in O.S.No.266 of 2002, the appeal suit was filed by the appellant himself. During the pendency of the appeal, according to the appellant, both the parties entered into compromise and the same was recorded and the appeal was closed. Subsequently, the respondent, without obeying the terms of the compromise, he filed the execution petition in E.P.No.165 of 2005 before the Principal District Munsif Court, Tuticorin. Hence, the appellant filed the second appeal. Hence, the appellant, without any further remedy, filed the second appeal before this Court. Now, the only question arose in this case is concerned, the appeal suit was not decided on merits. As rightly contended by the learned counsel for the appellant that as per the law laid down by the Hon'ble Supreme Court in the case of ***Jet Ply Wood Private limited and another Vs. Madhukar Nowlakha and others*** reported in **2006 3 SCC 699**, when there was a withdrawal of the compromise by either party, it was open to the party to adjudicate issues on merits.

10. In view of the law settled by the Hon'ble supreme Court, the



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question of the law is answered in favour of the appellant and this Court inclines to allow the second appeal with the following terms:

10.1.The Judgment and Decree passed in A.S.No.34 of 2004, dated 04.03.2005 by the Sub Court, Thoothukudi, is set aside confirming the Judgment and Decree dated 16.12.2003 passed in O.S.No.266 of 2002 by the Principal District Munsif Court, Thoothukudi, is set aside.

10.2.The learned Sub Court, Thoothukudi, is directed to decide the appeal suit on merits within a period of six months from the date of receipt of a copy of this order, without influencing any of the observations made in this order as well as order in I.A.No.162 of 2006.

11.Accordingly, this second appeal is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

28.03.2024

NCC : Yes / No
Index : Yes / No
Internet : *Yes / No*
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To

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



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K.K.RAMAKRISHNAN, J.

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