(2011) 11 MAD CK 0040

Madras High Court (Madurai Bench)

Case No: S.A. (MD) No. 1090 of 2011 and M.P. (MD) No. 1 of 2011

Veluchamy		APPELLANT
	Vs	
Venkadasamy and Dhanalakshmi		RESPONDENT

Date of Decision: Nov. 21, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100
- Evidence Act, 1872 - Section 106

Hon'ble Judges: G. Rajasuria, J

Bench: Single Bench

Advocate: M. Kalifullah for Mr. T. Lajapathi Roy, for the Appellant; S. Lakshmi Gopinathan, for the Respondent

Final Decision: Dismissed

Judgement

Honourable Mr. Justice G. Rajasuria

1. This second appeal is focussed by the plaintiff animadverting upon the judgment and decree dated 26.08.2009 made in A.S.No.31 of 2008 on the file of the Subordinate Court, Virudhunagar, in confirming the judgment and decree dated 06.12.2007 made in O.S.No.84 of 2007 on the file of the District Munsif Court, Virudhunagar.

2. The parties, for the sake of convenience, are referred to hereunder according to their litigative status and ranking before the trial Court.

3. Broadly, but briefly, narratively, but precisely, the germane facts absolutely necessary for the disposal of this second appeal would run thus:

The plaintiff filed the suit for declaration and for permanent injunction in respect of the immovable property described in the schedule of the plaint on the ground that he acquired title over it by virtue of various sale deeds.

4. However, the defendants resisted the suit by filing the written statement on the ground that the plaintiff is not the owner of the suit property and that he is not in possession of the same also.

5. Whereupon the trial Court framed the relevant issues.

6. During trial, P.W.1 and P.W.3 were examined and Exs.A.1 to A.6 were marked on the side of the plaintiff. D.W.1 and D.W.2 were examined and Exs.B.1 to B.14 were marked on the side of the defendants.

7. Ultimately, the trial Court dismissed the suit, as against which the appeal was filed by the plaintiff whereupon the first appellate Court in its judgment observed that despite having given ample opportunity, the plaintiff did not argue the appeal. However, the first appellate Court after hearing the defendants only, passed a detailed judgment.

8. Being aggrieved by and dissatisfied with the judgment and decree of both the Courts below, the present second appeal has been filed by the plaintiff on various grounds and also suggesting the following substantial questions of law:

(a) Whether 1st Appellate Court is correct in deciding the Appeal even without framing the issue separately in which it is mandatory under order 41 Rule 27 of C.P.C.?

(b) Whether the Courts below are correct in non shifting the burden of proof to the defendants who took the plea that Sankaralingam was the original owner of the suit schedule property?

(c) Whether the Courts below are correct in deciding the case in non shifting the burden of proof u/s 106 of the Evidence Act?

(extracted as such.)

9. The dictum laid down by the Honourable Apex Court in the following decisions:

(i) Hero Vinoth (minor) Vs. Seshammal, .

(ii) Kashmir Singh Vs. Harnam Singh and Another, and

(iii) State Bank of India and others v. S.N. Goya reported in 2009-1-L.W. 1; would be to the effect that u/s 100 of the Code of Civil Procedure, a Second Appeal cannot be entertained, unless a substantial question of law is involved.

10. The Honourable Apex Court, time and again, reiterated the point that in second appeal, as per Section 100 of the Civil Procedure Code, interference is possible if at all there is any perversity or illegality in the judgments of the Courts below or total absence in considering the evidence available on record or misreading of evidence on the part of the Courts below.

11. Keeping in mind the aforesaid dictum, I heard both sides.

12. At the outset itself, I would like to point out that this second appeal should not have been numbered at all by the Registry of this Court. The second appeal would arise if at all the first appeal was decided on merits, but on the other hand, if the purport of the judgment passed by the first appellate Court is only a judgment passed under Order 41 Rule 17 of the Code of Civil Procedure, which is extracted hereunder for ready reference:

17. Dismissal of appeal for appellant''s default.- (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

Explanation.- Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.

there is no question of preferring the second appeal. However, it would be different in a matter where pure substantial question of law without any reference to factual interpretation at all, but here the position is different.

13. I am at a loss to understand as to how on the virtual dismissal of the appeal for default by the first appellate Court, the second appeal would arise touching upon the imaginary substantial questions of law intermixed with facts.

14. The learned Counsel for the defendants would strenuously argue that this is a case where the plaintiff protracted the matter ad nauseam and ad infinitum; whereupon the first appellate Court got frustrated over the conduct of the plaintiff and consequently, on hearing the defendants, the first appellate Court in accordance with the then existing practice, delivered the judgment on merits, warranting no interference in second appeal, even on merits.

15. I would like to disagree with the arguments as put forth by the learned Counsel for the defendants. Incidentally, Order 41 Rule 19 of the Code of Civil Procedure, which is extracted hereunder:

19. Re-admission of appeal dismissed for default.- Where an appeal is dismissed under rule 11, sub-rule (2) or rule 17, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.", has to be read in conjunction with Order 41 Rule 17 of the Code of Civil Procedure. If the appellate Court finds that the appellant is not showing interest in arguing the matter, there is no other option but to dismiss the appeal for default even though the learned Counsel for the respondents/defendants might be ready to argue the matter. The only option open for the appellant/plaintiff who got the appeal dismissed for default, is to approach the same Court by filing a petition under Order 41 Rule 19 of the CPC for

re-admission of the appeal. But, in this case, it was not done so, but straight away, the present second appeal has been filed touching upon factual interpretation of evidence by the Courts below.

16. In this connection, I would also like to refer to the decision of the Honourable Apex Court in Asit Kumar Kar Vs. State of West Bengal and Others, . An excerpt from it, would run thus:

4. It is a basic principle of justice that no adverse orders should be passed against a party without hearing him. This is the fundamental principle of natural justice and it is a basic canon of jurisprudence. In the seven-Judge Constitution Bench of this Court in A.R. Antulay Vs. R.S. Nayak and Another, , it has been observed in para 55 thereof:

55.... So also the violation of the principles natural justice renders the act a nullity.

17. As such, a perusal of the aforesaid decision of the Honourable Apex Court would indicate and drive home the point that as per the principle of ''audi alteram partem'', due opportunity should be given to the other side and that is virtually the bedrock of objectivity in rendering justice.

18. I would also like to recall and recollect the maxim "Jura naturae sunt immutabilia". [Principles of natural justice cannot be dispensed with and should be adhered to.] Without hearing if any order is passed, it could only be taken as an order passed not on merits. However, it does not mean that the defaulting appellant could capitalise his default and go on getting adjournments and thereafter, file the application for re-hearing.

19. The Honourable Apex Court in the aforesaid decision set out the modalities in regard to the re-admission of the appeal. If the appeal is dismissed for default, there is no question of restoring the second appeal straight away. The appellant should file a petition for re-admission of the appeal and without further adjournment, he must express his readiness to argue the appeal on the same day. This has been set out in the aforesaid decision of the Honourable Apex Court. In this factual matrix, there is no other go but to dismiss this second appeal.

20. On balance, the second appeal is dismissed with the following observations:

If the plaintiff is so advised, it is open for him to file a petition under Order 41 Rule 19 of the CPC for re-admission of the appeal subject to the law of limitation in filing a petition to get the delay condoned, however, excluding the time taken for prosecuting this second appeal and it is for the first appellate Court after hearing the parties concerned, to decide as per law as to whether the delay could be condoned or not and whether the appeal has to be re-admitted for re-hearing or not.

Consequently, the connected Miscellaneous Petition is dismissed. No costs.