

(2011) 06 MAD CK 0543

In the Madras High Court

Case No : Second Appeal No. 633 of 2005 and Sub Application No. 333 of 2008

Ambujam Ammal and M.Sampathkumar

APPELLANT

Vs

The Commissioner and S.L. Munusamy

RESPONDENT

Date of Decision : 30-06-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Income Tax Act, 1961 — Section 260A

Citation : (2011) 06 MAD CK 0543

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : R. Swaminathan, for the Appellant; I. Paranthaman, for Respondent-1, Sudha Ramalingam, for Respondent-2 and R. Ravichandran, Additional Government Pleader for M.C. Swamy, Special Government Pleader in Contempt Petition No. 480 of 2008, for the Respondent

Final Decision : Dismissed

Judgement

K.Chandru, J.—The Second Appeal and the Contempt Petition came to be posted before this Court on being specially ordered by the Honourable Chief Justice vide order dated 28.04.2011.

2. In the Second Appeal, two Appellants are Plaintiffs and were also Appellants before the Lower Appellate Court. The Second Appeal is filed against the judgment and decree dated 30.11.2004 passed by the learned Principal Subordinate Judge, Salem, in A.S. No. 21 of 2004, confirming the order dated 02.04.2004, passed by the learned Principal District Munsif, Salem in O.S. No. 603 of 2002.

3. When the Second Appeal came up for admission on 21.05.2005, this Court framed the following substantial questions of law in terms of Section 100 of the Code of Civil Procedure:

a) Whether the notice issued by the 1st Respondent was in accordance with the

provisions of the T.N. Public Premises (Eviction of Unauthorised Occupants) Act (1 of 1976)?

b) Have not the Courts below misdirected themselves by casting the burden of proof wrongly on the Plaintiffs and misguided themselves about the scope of the suit?

c) Have not the Courts below overlooked the admission of the 1st Respondent Municipality as to possession of the property by Appellants / Plaintiffs?.

This Court also granted an order of interim injunction on 21.05.2005. But subsequently, the said interim injunction was made absolute on 03.08.2006, in C.M.P. No. 9041 of 2005.

4. The second Respondent in S.A. No. 633 of 2005 has filed a petition in C.M.P. No. 2899 of 2007 for vacating the interim injunction and that application was dismissed as it was not maintainable in view of the earlier order, by an order dated 24.10.2007.

5. For the alleged disobedience of the order dated 03.08.2006 passed in C.M.P. No. 9041 of 2005, the Appellants have filed a contempt petition in Cont.P. No. 480 of 2008 seeking to punish the Respondents therein for willfully disobeyed the said order. In the contempt petition, a counter affidavit dated 04.09.2008 was also filed by the then Tahsildar, Salem.

6. It is only when the contempt petition came up for hearing on 25.04.2011, this Court directed the main Second Appeal itself to be taken up and accordingly, orders were obtained from the Honourable Chief Justice for hearing both the matters together.

7. The Appellants filed a suit in O.S. No. 603 of 2002 before the Principal District Munsif, Salem. The relief was for a declaration that the proceedings dated 31.07.2002 issued by the Commissioner, Salem City Municipal Corporation, was null and void and also sought for a permanent injunction not to interfere with their possession and enjoyment of the suit property. The Commissioner in the written statement contended that the Appellants have encroached the suit property in S. No. 9/2B-1 in Sankar Nagar, Salem, which is a F2 Scheme road in Periyeri Road and the Hasthampatty Main Road. The F2 Scheme road is a link road connecting the Periyeri Road and the Hasthampatty Main Road. The possession and enjoyment of the Appellants over the suit property from 1950 was also denied. If the encroachments were removed, the F2 scheme road is put up, the same will be benefiting all public and the Corporation is entitled to remove the encroachments. The second Respondent Defendant also filed a written statement claiming that the Appellants are trespassers in the scheme road.

8. Before the Trial Court, seven documents were filed on the side of the Appellants and marked as Exs.A1 to A7 and the second Appellant was examined as P.W.1. On the side of the Defendants, 6 documents were filed and marked as

Exs.B1 to B6 and 2 witnesses were examined as D.W.1 and D.W.2.

9. In respect of the first issue, the Trial Court found that in Exs.A1 to A7, there was No. proof that the Appellants were in possession and enjoyment of the suit property measuring East West 51 feet and North South 40 feet. The Appellants have failed to prove that they have not encroached any portion of the road and hence, they are not entitled for the relief of declaration and the consequential relief of interim injunction. In respect of the additional issue No. 1, the Trial Court found that the Corporation has issued notice for removal of encroachment made in the suit property and only to escape from the removal of encroachment, the Appellants have filed the suit. As per Exs.B1 to B6, it was found that the road portion was gifted by two persons and it is only for the purpose of forming a scheme road. Even in the question of the exact land in which the ownership is claimed, the Appellants have failed to prove the same. Therefore, the suit in O.S. No. 603 of 2002 was dismissed with costs on 02.04.2004.

10. Against the order dated 02.04.2004 passed in O.S. No. 603 of 2002, the Appellants have filed First Appeal before the Lower Appellate Court in A.S. No. 21 of 2004. The Lower Appellate Court, after analysing the entire evidence and going through the documentary evidence, found that in the interest of public, the encroachment will have to be removed and therefore, the Appellants cannot forestall the same by filing a suit and the same was dismissed by a judgment and decree dated 30.11.2004.

11. Though the Appellants contended that notice was not issued in terms of the Tamil Nadu Public Premises (Eviction of Unauthorised Occupants) Act, 1976, the Courts below found that the contentions raised by the Appellants were not valid and it gave a sound reason that the Appellants themselves were encroachers and the notice for eviction was given to remove the encroachment in the interest of public. Though at the stage of Second Appeal, the Appellants cannot raise an issue about the infirmity in the notice, because before the Trial Court as well as the Lower Appellate Court they have let in evidence to prove the title of the property and failed to establish the same and the Courts also found that the suit itself was filed to forestall the eviction of the Appellants, this Court cannot be used for producing fresh facts. The Appellants have not come with clean hands in establishing their rights over the suit property. Having lost badly before the Trial Court, they are now trying to bring upon the technical ground about the want of proper notice. That cannot raise a substantial questions of law as the said issue cannot be raised before the Courts below. The Appellants themselves have invited the findings regarding the possession and title and having failed to prove the same, they cannot use the Second Appeal to continue in possession of the suit property.

12. The Supreme Court while dealing with the question of Appeal u/s 260-A of the Income Tax Act, 1961 in Vijay Kumar Talwar Vs. Commissioner of Income Tax, Delhi, , in paras 19 to 23, it was observed as follows:

19. It is manifest from a bare reading of the section that an appeal to the High Court from a decision of the Tribunal lies only when a substantial question of law is involved, and where the High Court comes to the conclusion that a substantial question of law arises from the said order, it is mandatory that such question(s) must be formulated. The expression "substantial question of law" is not defined in the Act. Nevertheless, it has acquired a definite connotation through various judicial pronouncements.

20. In *Sir Chunilal V. Mehta & Sons Ltd., V. Century Spg. and Mfg. Company Ltd.*, a Constitution Bench of this Court, while explaining the import of the said expression, observed that: (AIR p.1318, para 6)

6. ...The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.

21. Similarly, in *Santosh Hazari v. Purushottam Tiwari*, a three - Judge Bench of this Court observed that: (SCC pp. 187-88, para 14)

14. A point of law which admits of No. two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.

22. In *Hero Vinoth v. Seshammal*, this Court has observed that: (SCC p.556, para 24)

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-

recognised exceptions are where (i) the courts below have ignored material evidence or acted on No. evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on No. evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

23. A finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on No. evidence and/or while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread. (See *Madan Lal v. Gopi*, *Narendra Gopal Vidyarthi v. Rajat Vidyarthi*, *Commr. of Customs v. Vijay Dasharath Patel*, *Metroark Ltd. v. CCE and W.B. Electricity Regulatory Commission v. CESC Ltd.*)

13. If analysing the touchstone of the principles laid down by the Supreme Court, then it is not a fit case where any appeal can entertain and hence, the Second Appeal stands dismissed. No. costs.

14. The Contempt Petition arose out of the interim order passed by this Court and the second Respondent in the Contempt Petition had filed a counter affidavit stating that there was No. violation of the order passed by this Court. This Court is satisfied with the explanation offered by the Respondents and hence, the Contempt Petition stands dismissed. Consequently, connected sub-application is closed.