

(2013) 11 MAD CK 0255

In the Madras High Court

Case No : S.A.No.1301 of 2013 and M.P.No.1 of 2013

Annammal

APPELLANT

Vs

B.R. Syan Larel Rex

RESPONDENT

Date of Decision : 29-11-2013

Acts Referred:

Citation : (2014) 1 MadWN(Civil) 696

Hon'ble Judges : Mr. S.Palanivelu, J.

Bench : Single Bench

Advocate : Mr. M.S. Subramanian, Advocate, for the Appellant; Mr. D.Gopinath for Caveator, for the Respondent

Final Decision : Disposed Off

Judgement

Mr. S.Palanivelu, J.—The defendants are the appellants and the plaintiffs are the respondents. The second appeal is filed against the judgment and decree dated 28.03.2013 in A.S.No.19 of 2003 on the file of Subordinate Judge, Tiruvallur confirming the judgment and decree dated 13.4.1998 passed in O.S.No.801/1982 on the file of the District Munsif Court, Tiruvallur.

2. The case of the appellant/defendant is as follows:-

The plaintiff is the owner of the suit in the plaint sketch. The site was purchased by one Gabriel Ammal @ Sowriammal w/o Pathakamoori Sowrayya Naidu under sale deed dated 01.04.1959. The northern owner in this deed is given as Ayanavaram Society instead of plaintiff's land and the western owner as Etukeri Innayya instead of the defendant. The defendants purchased under sale deed dated 22.11.1956, the site AJHL in the plaint sketch from Rachaelammal, the 2nd wife of B.Innayya Naidu, both of plaintiff's father's father B.Bapayya Naidu for Rs.100/- in value then. In this sale deed, the northern owner is given as P.Papayya Naidu instead of B.Bapayya Naidu father's father of the plaintiff. The defendant trespassed in July 1978 into the portion of the suit site ABCDKJA, and put up a thatched house in it after removing his thatched house in AJHL site.

The plaintiff issued notice dated 09.09.1978 to the defendant and reply dated 20.09.1978 is false. The defendant, after notice, trespassed into AEFGHIKD also, cut and removed the velikathan trees in it and is storing rubbish in it. Hence, the suit.

3. The following are the allegations contained in the written statement filed by the defendant :-

The suit is false and not maintainable, that the details in plaint sketch are not correct and the measurement given therein are not acceptable, that the description of boundaries are not correct. The plaintiff is put to strict proof of the sale deed dated 22.11.1956 and 01.04.1959 and that they never created any right to the plaintiff, that the north-south site is bounded on the west and tapers towards east, that the western property from the south street to site of Milk Society belongs to the defendant in pursuance of the purchase deed dated 22.11.1956 and that the plaintiff stealthily purchased it from Gokillammal. In the northern portion, the defendant had put up a house and is residing there and that the site commencing from the site of Milk Society towards the south street is the property in the possession of the defendant, that the southernmost portion is a poromboke and the defendant had annexed it with his site, that the defendant is in exclusive possession and enjoyment for more than the statutory period and that the suit item is not in existence as described in the plaint schedule, that the dimension and the descriptions given are not admitted and the plaintiff has no manner of any right or interest in the same and hence the suit may be dismissed with costs.

4. Based on the above pleadings, the trial Court framed relevant issues. During the trial of the case, on the plaintiff's side seven (7) documents were exhibited and on the side of the defendants nine exhibits were marked. On the side of plaintiffs, Pws 1 to 5 were examined and on the side of defendants, Dws 1 to 6 were examined. After perusal of the documents and arguments of both sides, the trial Court has decreed the suit in favour of the plaintiffs. Aggrieved against the same, the defendants preferred appeal and the first appellate dismissed the appeal confirming the judgment and decree dated 13.4.1998 passed in O.S.No.801/1982 on the file of the District Munsif Court, Tiruvallur. Aggrieved against that judgment the appellants/defendants are before this Court by way of this second appeal.

5. After hearing the arguments of both sides, this court has framed the following substantial question of law in the presence of both sides -

1. Whether the First Appellate Court is right in dismissing the appeal provided for nonappearance of the appellants/defendants ?

6. In the case on hand, A.S.No.19 of 2003 was posted on 27.03.2013 for hearing before the Appellate court. On that date, the learned counsel for the appellant reported no instructions. Hence, the court heard the arguments of the respondent and adjourned the case to 28.03.2013. On 28.03.2013, the judgment

was pronounced by the Appellate court dismissing the appeal by confirming the judgment and decree of the trial court. The "A" diary extract goes thus -

"27.3.2013 - A.S.19/03 - Counsel for appellant not ready. Heard argument for respondent for judgment by 28.3.13. Counsel for Appellant reported no instructions.

28.3.13 - A.S.19/03 - Judgment pronounced. In the result, the appeal is dismissed. The judgment and decree passed in O.S.801/82 dated 13.4.1998 by the learned District Munsif, Tiruvallur is hereby confirmed. No cost.

Ind/- A.S.

S.J.

7. The Appellate Court Judge has not adopted proper procedures when the appellant was not before the court. He has to issue notice to the party namely appellants, in case of his counsel reporting no instructions. The learned Judge is not expected to proceed to pronounce judgment when the appellant was absent. In the case on hand, the first Appellate Court passed the judgment on merits on the basis of arguments of respondents.

8. In this context, a decision of the Division Bench of this Court has to be followed in which the decision of the Hon"ble Supreme Court has been followed. The procedure to be adopted by the Appellate Court has been set out in a decision of this Court reported in 2013 (2) CTC 177 [K.Loganathan v. K.Sahadevan and others] which is as follows -

"8. It is also settled position of law that, when a vakalat has been filed by the counsel appearing for the defendant or the plaintiff, as the case may be, and the said counsel has not appeared, it is incumbent upon the Court to issue notice to the parties concerned, vide judgment of the Hon"ble Apex Court in Malkiat Singh v. Joginder Singh, AIR 1998 SC 258. The said method has not been adopted while setting the appellant ex parte. Even otherwise, the appellant was said to be absent for only three hearings. The hearings were between 23.04.2010 and 28.04.2010, within a span of seven days.

9. In view of the above settled procedures, as set out by the Hon"ble Supreme Court as well as this Court, the first Appellate Court has to dispose of the appeal. The substantial question of law is answered as above.

10. In the result, the second appeal is allowed setting aside the judgment and decree dated 28.03.2013 passed in A.S.No.19 of 2003 on the file of Subordinate Judge, Tiruvallur and the case is remitted back to the Appellate Court namely, Sub Court, Tiruvallur. After remanding the suit, the learned Subordinate Judge, Tiruvallur shall dispose of the appeal, by following the settled principles and by issuing notice to the appellants. After affording sufficient opportunities to both sides, the appeal shall be disposed of, preferably by end of February, 2014. No costs. Consequently, connected Miscellaneous Petition is closed.