

(2011) 06 MAD CK 0030
In the Madras High Court
Case No : S.A. No. 131 of 1997

Jayarama Reddiar and Dhanalakshmi	APPELLANT
Vs	
Narayanasamy Reddiar @ Durairaj Reddiar Narayanasamy Reddiar @ Durairaj Reddiar Vs Jayarama Reddiar and Dhanalakshmi	RESPONDENT

Date of Decision : 17-06-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Citation : (2011) 06 MAD CK 0030

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : A.R. Nixon, for the Appellant; D. Govinda Reddy, for the Respondent

Final Decision : Allowed

Judgement

R.S. Ramanathan, J.—The Defendants 2 and 3 are the Appellants.

2. The suit was filed by the Respondent/Plaintiff for declaration that the "A" schedule property belongs to him and for injunction restraining the

Appellants/Defendants from interfering with the Respondent/Plaintiff possession over the same and for declaration that the Respondent/Plaintiff is

entitled to half share in the "B" schedule property, which is a well and he is entitled to draw water from the said well and for injunction restraining

them taking water from the well.

3. The suit was dismissed and the first appeal filed by the Plaintiff was allowed and therefore, the Appellants have filed this second appeal.

4. The second appeal was admitted on the following substantial questions of law:

1. Whether the Lower Appellate Court erred in disposing of the applications under Order 41 Rule 27 CPC before the disposal of the appeal?

2. Whether the Lower Appellate Court erred in holding that the compromise decree in O.S. No. 326 of 1949 is valid in law?

3. Whether the Lower Appellate Court failed to note that the suit property was not included in the plaint in O.S. No. 326 of 1949 and hence, the

compromise decree is not valid in law, since a property which is not included in the plaint can not be included in the compromise decree?

4. Whether the Lower Appellate Court failed to note that the compromise decree is not valid since it is not registered under the Indian Registration

Act, since the right claimed by the Respondent was not a pre-existing right but it was a right claimed for the first time?

5. Whether the Lower Appellate Court failed to note that the plaint in O.S. No. 293 of 1992 on the file of the District Munsif, Thirukoilur, which

is marked as Ex.B 41 runs contradictory to pleadings in the suit?

6. Whether the Lower Appellate Court failed to note that the Appellants have proved title by adverse possession?

5. For the reasons stated below, I am not willing to go into the merits of the case and therefore, the facts of this case are not discussed in this appeal.

6. It is admitted that along with the first appeal, I.A. Nos. 230, 231 of 1996 and I.A. No. 655 of 1995 were filed by the Appellant/Respondent for

the admission of additional documents under Order 41 Rule 27 and before hearing the appeal on merit, the Lower Appellate Court allowed the

applications. Even after allowing the applications, the documents, which were sought to be marked by the respective parties were not marked by

the Lower Appellate Court and no discussion was made in respect of those documents, while disposing of the appeal by the Lower Appellate

Court. This fact is also admitted by the Respondent and is also borne out of the records. The 1st appeal was disposed of on 30.12.1996 and on

29.11.1996, the applications were allowed by the Lower Appellate Court holding that those documents are necessary for the disposal of the first

appeal. Nevertheless, no attempt was made by the Lower Appellate Court to mark those documents and no discussion about those documents,

while disposing of the first appeal. Therefore, it was submitted by the learned Counsel appearing for the Appellants that the procedure adopted by

the Lower Appellate Court in disposing of the applications filed under Order 41 Rule 27 before hearing of the appeal is erroneous and is against

the provision of Order 41 Rule 27 and the Lower Appellate Court also erred in disposing of the appeal without any reference to those documents

filed by both the parties and therefore, the the judgment and decree of the Lower Appellate Court has to be set aside and the matter has to be

remitted to the Lower Appellate Court for fresh disposal.

7. The learned Counsel appearing for the Appellants also submitted that he has also raised the same as substantial question of law and if the said

substantial question of law is answered in his favour, there is No. need to go into the merits of the case. He also relied up on the following

judgments in support of his contention:

1. 1994 TNLJ 180 in the case of M. Ayyaswami and Anr. v. S.P.Ganesan and Anr.,

2. M.Shanmughasundaram Vs. N.T.P. Subburaya Chettiar, ,

03 Smt. Sakuntala Chakraborty Vs. Shiba Prosad Roy and Another, .; and

4. (2008) 1 MLJ 1253 (SC) in the case of K.R. Mohan Reddy v. Net Work INC. Rep.T.R.M.D.

8. On the other hand, the learned Counsel appearing for the Respondent submitted that though there was violation of provision under Order 41

Rule 27, those documents can be considered in the first appeal and the appeal can be decided on merit and there is No. need to remit the matter

to the Lower Appellate Court.

9. Heard both sides.

10. It is admitted that three applications were filed for receiving additional documents under Order 41 Rule 27 by both parties and those were

disposed of on 29.11.1996 prior to the disposal of the first appeal. Order 41 Rule 27 makes it clear that those applications shall be heard along

with the appeal and if the Lower Appellate Court was of the opinion that those documents are necessary to pronounce the judgment, the same can

be received as additional evidence and those documents must be discussed in the judgment. In this case, they are two violations: (i) The

applications filed under Order 41 Rule 27 were disposed of, prior to the hearing of the first appeal; and (2)Even after allowing those applications,

No. attempt was made by the Lower Appellate Court to mark those documents or discussed those documents while disposing of the 1st appeal.

Therefore, in the light of the judgments relied upon by the learned Counsel

appearing for the Appellants as referred to above, the procedure followed by the Lower Appellate Court is against the provision of law and therefore, the judgment of the Lower Appellate Court is set and the second appeal is remitted back to the Lower Appellate Court for fresh disposal. Therefore, the substantial question of No. 1 is answered in favour of the Appellants

11. Having regard to the answer given to the first substantial question of law, there is No. need to answer the other substantial questions of law.

12. In the result, the second appeal is allowed and the judgment and decree of the Lower Appellate Court is set aside and the matter is remitted to the Lower Appellate Court and the Lower Appellate Court is directed to consider the applications filed by the parties as additional evidence on

merit as per the principles laid down by the Hon''ble Supreme court and our High Court and decide the first appeal on merit and if the Lower

Appellate Court feels that those documents can be received in evidence, the Lower Appellate Court is directed to consider those documents while

disposing of the appeal. The lower Appellate Court is directed to dispose of the 1st appeal within a period of three months from the date of receipt

of a copy of this order. Accordingly, this second appeal is allowed with the above observations. No. costs.