Padmavathi Vs. Chellathai and ors.

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Court : Chennai

Decided On : Nov-02-2011

Judge : G.Rajasuria, J.

Acts : Code of Civil Procedure (CPC) - Orders 41,12 Rules 27, 28, 2

Appeal No. : S.A.(MD)No.487 of 2011 and M.P.(MD) No.1 of 2011

Appellant : Padmavathi

Respondent : Chellathai and ors.

Judgement :

1. This Second Appeal is focussed by the original Plaintiff animadverting upon the judgment and decree dated 29.04.2011, passed in A.S.No.7 of 2008 by the learned Principal District Judge, Tirunelveli in reversing the judgment and decree dated 11.10.2007, passed in O.S.No.7 of 2005 by the learned Subordinate Judge, Sankarankovil.

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

3. A re'sume' of facts absolutely necessary and germane for the disposal of this second appeal would run thus:

The plaintiff - Padmavathy filed the suit for declaration and permanent injunction on the main ground that she inherited the property from her father Antony S/o. Kovilpillai.

4. The defendants resisted the suit by filing the written statement contending that they purchased the property from K.S.Antony, who was the real owner and they had been in possession and enjoyment of the same ever since the purchase and prayed for dismissal of the suit.

5. Whereupon, relevant issues were framed by the trial Court.

6. During trial, the plaintiff examined herself as P.W.1 in addition to examining P.Ws.2 and 3 and marking Exs.A.1 to A.35 on her side. The first defendant examined herself as D.W.1 in addition to examining D.Ws.2 to 4 and marking Exs.B.1 to B.19 on their side.

7. Ultimately, the suit was decreed by the trial Court, against which appeal was filed by the defendants.

8. Whereupon, the first appellate Court reversed the judgment and decree of the trial Court after entertaining additional evidence and marking Exs.B.20 to B.33 suo motu without recalling any witnesses or getting the consent of the other side.

9. Being aggrieved by and dissatisfied with the judgment and decree of the first appellate Court, the plaintiff preferred this Second Appeal on various grounds, suggesting the following substantial questions of law: (A) Whether the 1st Appellate Court has erred in receiving and marking the Additional Documents filed by the appellants before it, even without giving any opportunity to the Plaintiff/Appellant herein to disprove the varsity, relevancy or otherwise of such documents and considered those documents as if they were proved and chosen to pass the judgment on the basis of those documents?

(B) Whether the 1st Appellate Court has failed to apply and followed the principle of the procedural law, contemplated under Order 41, Rule 27 and 28 of the Code of Civil Procedure to decide the admissibility of the additional documents filed by the Respondents/ Defendants?

(C) Whether the 1st Appellate Court is correct is reversing the Judgment and Decree of the trial court without dealing no where in its judgment, how the reasoning assigned by the trial court to arrive its finding are wrong and erroneous?

(Extracted as such)

10. At the outset itself, I would like to fumigate my mind with the principles as found enunciated and enshrined in the following decisions of the Honourable Apex Court:

(i) Hero Vinoth (Minor) v. Seshammal reported in (2006) 5 Supreme Court Cases 545.

(ii) Kashmir Singh v. Harnam Singh and another reported in 2008 (4) SCALE 300.

(iii) State Bank of India and others v. S.N.Goya reported in 2009-1-L.W.1.

11. A bare poring over and perusal of the said decisions would unambiguously and unequivocally highlight and spotlight the fact that unless any substantial question of law is involved, the question of entertaining a Second Appeal would not arise.

12. Heard both sides with the aforesaid intention to find out as to whether any substantial question of law is involved.

13. After hearing both sides, I am of the view that the following substantial question of law should be framed in this case: (i) Whether the first appellate Court was justified in entertaining additional evidence and marking documents, suo motu while disposing the main first appeal itself without recalling any witness on the side of the defendants or calling upon the defendants to mark them in the way known to law? (ii) Whether the first appellate Court was justified in not giving due opportunity to the respondents therein to adduce rebuttal evidence?

14. A summation and summarisation of the arguments as put forth and set forth by the learned counsel for the plaintiff would run thus:

The first appellate Court was not justified in simply allowing the application under Order 41, Rule 27 of the Code of Civil Procedure and marking those additional documents as many as 14 in number and simply delivering the judgment in the appeal suit without adhering to Order 41 Rule 28 of the Code of Civil Procedure.

15. In a bid to mince meat, and torpedo and pulverise the arguments as put forth and set forth on the side of the plaintiff, the learned Counsel for the defendants by inviting the attention of this Court to various exhibits and also the oral evidence would develop his arguments thus:

The first appellate Court adhering to justice and fair play marked the additional documents as Exs.B.20 to B.33 and that too, after viewing that the plaintiff's contention before the first appellate Court was fraught with falsities and inconsistencies and that she with her bare faced lies attempted to get processed her false case before the first appellate Court by hook or crook. In a bid to thwart and throttle the said attempt, the first appellate Court keeping in mind the interest of justice dealt with the matter by marking the additional documents as Exs.B.20 to B.33 and allowed the appeal itself along with I.A.No.276 of 2009 filed under Order 41 Rule 27 of the Code of Civil Procedure, which warrants no interference in the Second Appeal.

16. In support of his contention, the learned Counsel for the defendants cited the decision of the Division Bench of this Court in M. Shanmugha Udayar v. Sivanandam reported in AIR 1994 Madras 123.

17. Whereas the learned Counsel for the plaintiff cited the decision of the Honourable Apex Court in Shalimar Chemical Works Ltd. v. Surendra Oil and Dal Mills reported in (2010) 8 Supreme Court Cases 423.

18. It is therefore, just and necessary to analyse and understand the purport of the precedents cited before me.

19. An excerpt from the decision of the Division Bench of this Court in M. Shanmugha Udayar v. Sivanandam reported in AIR 1994 Madras 123 would run thus: 9. The first two documents are registration copies of a sale deed dated 20.8.1943 and an exchange deed dated 6.9.1956. While the sale deed relates to suit item No. 38, the appellant is one of the parties to the exchange deed which

covers suit items 82,83 and 90. So the relevancy and admissibility of these documents could not be disputed. The other documents are four letters purported to have been written by the plaintiff to the appellant during 1972 and 1980. The plaintiff in his counter-affidavit simply states that these documents are not necessary or relevant for deciding the issues in the appeal and he does not admit them. However, he does not dispute the genuineness of these letters in the counter. Only during arguments he made a faint attempt to dispute their authenticity. But we compared the signatures and writings therein with those found in Exs.B-1 and B-2 letters written by him and are satisfied that the letters sought to be filed as additional evidence are genuine. So we allow this application, receive them as additional evidence and mark as Exs.B-40 to B-45. (Emphasis supplied)

20. No doubt, in that case, this Court entertained additional evidence without recalling any witnesses to prove the documents on the ground that the genuineness of the registration copies of the sale deed and the exchange deed were not disputed. As such, on fact, the said decision is distinguishable. In consimili casu, the precedent should be applied and not to a case of different kettle of fish.

21. The learned Counsel for the plaintiff vehemently argued that the petition filed the counter disputing the additional documents sought to be filed in the first appellate Court.

22. However, the learned Counsel for the defendants would submit that in the counter filed before the first appellate Court, to the I.A. concluded, the genuineness of the documents were not disputed, except in respect of one unregistered agreement, i.e. Ex.B.28. He would also express that the plaintiff's pleas are the one which are to hide a big pumpkin in a small plate of rice and that was noticed by the first appellate Court and with the allowed object of giving speedy disposal and render justice, the matter was dealt with by the first appellate Court, which cannot be found fault with. De hors, those additional documents, the defendants established their case and torpedoed the false case of the plaintiff and in the Second Appeal, this Court could even exclude those additional evidence and appreciate the remaining evidence, which were adduced before the trial Court

and render judgment.

23. Per contra, the learned Counsel for the plaintiff would submit that such an argument is neither here nor there, for the reason that it is not enough that justice is done, but it, should be seen to be done, in other words objectivity in the hall mark of rending justice. In this factual matrix, the first appellate Court itself as per law, was not expected to mark the documents, when they were not admitted by the plaintiff.

24. An excerpt from the decision of the Honourable Apex Court in Shalimar Chemical Works Ltd. v. Surendra Oil and Dal Mills reported in (2010) 8 Supreme Court Cases 423 cited by the plaintiff would run thus: 10. Mr. Rao submitted that the provision of Order 13 Rule 4 CPC provides for every document admitted in evidence in the suit being endorsed by or on behalf of the court, and the endorsement signed or initialled by the Judge amounts to admission of the document in evidence. An objection to the admissibility of the document can be raised before such endorsement is made and the court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend, the document being endorsed, admitted or not admitted in evidence. In support of the submission he relied upon a decision of this Court in R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple1 where it was observed as follows: (SCC p. 764, para 20) 20. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter

proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court.

11. The learned counsel contended that since the procedure followed by the trial court was contrary to the procedure prescribed by Order 13 Rule 4, in appeal against the trial court judgment, the learned Single Judge of the High Court was fully justified in accepting the originals of the documents concerned in evidence and the Division Bench was not right in holding that the originals of the documents concerned were wrongly taken in evidence. Mr. Rao submitted that while enumerating the circumstances in which production of additional evidence may be allowed, the Division Bench overlooked the words or for any other substantial reason at the end of clause (b) of Rule 27(1). He submitted that those words greatly enlarged the scope of the provision and were especially relevant for a case like the one in hand where the plaintiff had suffered great prejudice due to the incorrect procedure followed by the trial court. In support of his submission he relied upon the decision of this Court in K. Venkataramiah v. A. Seetharama Reddy, AIR 1963 SC 1526: (AIR p. 1530, para 16) 16. Apart from this, it is well to

remember that the appellate court has the power to allow additional evidence not only if it requires such evidence 'to enable it to pronounce judgment' but also for 'any other substantial cause'. There may well be cases where even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence 'to enable it to pronounce judgment' it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence 'for any other substantial cause' under Rule 27(1)(b) of the Code.

12. Mr Rao further submitted that the very narrow view of Order 41 Rule 27 taken by the Division Bench has only led to frustrate the ends of justice. In order to lend strength to his submission, Mr Rao referred to the illuminating and perennially relevant passage from the judgment of Vivian Bose, J. in Sangram Singh v. Election Tribunal, AIR 1955 SC 425: (AIR p. 429, para 16) 16. Now a code of procedure must be regarded as such. It is 'procedure', something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it.

25. The judgment of the Honourable Apex Court would unambiguously and unequivocally highlight and spotlight the fact that due opportunity should be given to the other side to object to the marking of the documents.

26. I would like to extract Order 41 Rule 27 and 28 of the Code of Civil Procedure, 1908, hereunder for ready reference:

27. Production of additional evidence in Appellate Court. - (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced, or witness to be examined to enable it to pronounce judgment, or for any other substantial cause. the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

28. Mode of taking additional evidence. - Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

27. Cumulatively all these provisions in the light of the aforesaid decisions, would leave no doubt in the mind of any one that the appellate Court is not prevented from entertaining additional evidence. However, if the additional evidence to be entertained are of formal in nature for the purpose of keeping the recorded straight or and for the purpose of getting clarified certain facts, then the matter would be slightly different. But, on the other hand, voluminous documents as in this case, 14 in number, cannot be filed as additional evidence and marked and that too, in absence of consent having been given by the respondent therein, wherefore it is glaringly and pellucidly clear that the first appellate Court was justified in simply taking the I.A. along with the Appeal Suit and dispose of the Appeal Suit by marking those voluminous and disputed documents suo motu.

28. I also instantly like to refer to Order 12 Rule 2 of the Code of Civil Procedure, 1908 thusly:

2. Notice to admit documents. - Either party may call upon the other party to admit, within seven days from the date of service of the notice any document saving all

just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such documents shall be paid by the party so neglecting or refusing whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense. 2A. Document to be deemed to be admitted if not denied after service of notice to admit documents. - (1) Every document which a party is called upon to admit, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of that party or in his reply to the notice to admit documents, shall be deemed to be admitted except as against a person under a disability:

Provided that the Court may, in its discretion and for reasons to be recorded, require any document so admitted to be proved otherwise that by such admission.

(2) Where a party unreasonably neglects or refuses to admit a document after the service on him of the notice to admit documents, the Court may direct him to pay costs to the other party by way of compensation.

29. This provision is a forgotten one and is not having followed generally, even though it is very much available in the statute book not only could it be invoked before the trial Court, but also before the appellate Court, along with Order 41 Rule 27 of the Code of Civil Procedure.

30. I would like to highlight that while filing an application under Order XLI Rule 27 of the Code of Civil Procedure, the petitioner is also entitled to invoke Order XII Rule 2 of the Code of Civil Procedure; so that if the opponent admits certain documents, the same could be readily taken as evidence and only in respect of the documents which are not admitted, steps could be taken to see that they are faunally marked, by adducing proof. In some cases, the petitioner if satisfied with the marking of certain documents, only he may even drop the idea of marking the remaining documents and thereby precious judicial time could also be saved.

31. Here, the plaintiff disputed tooth and nail the very existence of one K.S.Antony and in order to prove that it was K.S.Antony, Son of Kovilpillai Savarimuthu, who

was very much alive and lived in Ceylon and sent money order for a sum of Rs.200/- for creating 'Othi' in respect of a part of the suit property in the year 1951, a few documents were sought to be filed and marked. However, these are all new facts placed before the first appellate Court.

32. It is one thing to give due opportunity to one party to prove his case, but it is yet another thing that the opponent should also be given opportunity to rebut the evidence. But, in this case, that had not been adhered to by the first appellate Court. According to the learned Counsel for the defendants himself, Ex.B.28 was an unregistered agreement which allegedly emerged between the plaintiff and K.S.Antony's wife, but the plaintiff did not admit it.

33. Not to put too fair a print on it, a fortiori, that the first appellate Court on considering that the defendants/appellants should be given opportunity to adduce evidence, should have simply allowed the I.A. and called upon the appellants/defendants to produce witness to mark the documents. But that was not done so and even opportunity was not given to the plaintiff to adduce rebuttal evidence.

34. Hence, in these circumstances, I am of the view that the judgment and decree of the first appellate Court should necessarily be set aside and the matter has to be remitted back to the first appellate Court for the purpose referred to supra. Accordingly, the substantial question of law is answered.

35. On balance, the Second Appeal is allowed and the matter is remitted back to the first appellate Court with the following directions: The appellants/defendants before the first appellate Court shall produce D.W.1, as suggested by the learned counsel for the defendants, and get the additional documents marked subject to objections if any by the plaintiff, who should be given due opportunity to further cross-examine D.W.1. Thereafter, the plaintiff shall be given due opportunity to rebut the evidence; and whereupon the first appellate Court hearing both sides shall render judgment preferably within a period of two months from the date of receipt of a copy of this judgment. The parties shall appear before the first appellate Court on 01.12.2011.

No costs. Consequently, connected M.P.(MD) No.1 of 2011 is dismissed.