



S.A.(MD)No.180 of 2016

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

**DATED: 29.10.2024**

**CORAM:**

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN**

**S.A.(MD)No.180 of 2016**

1.R.Shanmugham

2.A.Marudhamuthu

... Appellants 1-2 /  
Appellants 1-2 /  
Plaintiffs 1-2

N.Yelumalai (Died)

3.Palaniammal

4.Jayalakshmi

5.Sathishkumar

... Appellants 3 to 5/  
Nil / Nil

***(Cause title accepted vide order of this Court dated 31.07.2007)***

**-Vs-**

1.Rajalingam

2.Mahesh

3.Ganesh @ Kanakasundaram (Died)

4.G.Kuppammal

5.S.Nagamani



WEB C 6.G.Mahadevi  
7.G.Mahalakshmi

8.G.Ananthi

9.G.Suganthi

10.G.Gunasundari

*(R.4 to R.10 are brought on record as  
legal heirs of the deceased third  
respondent vide order of this Court  
dated 22.11.2019)*

... Respondents /  
Respondents /  
Defendants

**PRAYER:** Second Appeal filed under Section 100 of the Civil Procedure Code, to set aside the decree and judgment made in A.S.No.86 of 2003 dated 08.12.2005 on the file of II Additional Subordinate Judge, Tiruchirapalli confirming the decree and judgment made in O.S.No.2145 of 1993 dated 23.10.2003 on the file of II Additional District Munsif Court, Tiruchirapalli, by allowing the second appeal.

For Appellants : Mr.Raguvaran Gopalan  
for Mr.K.Prabhakar

For Respondents : Mr.M.Saravanan for R.2  
Mr.J.Sanjay Vignesh  
for R.4 to R.10

No Appearance for R.1

R.3 – Died



## **JUDGMENT**

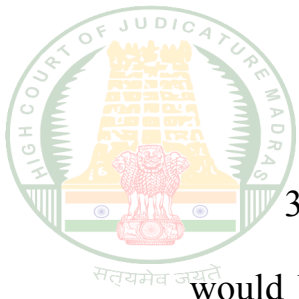
WEB COPY Heard both sides.

2.The plaintiffs in O.S.No.2145 of 1993 on the file of II Additional District Munsif Court, Tiruchirappalli are the appellants in the Second Appeal. It is a suit for bare injunction. The suit was dismissed. Questioning the same, the plaintiffs filed A.S.No.86 of 2003 on the file of II Additional Sub Court, Tiruchirappalli. The first appeal was also dismissed. Challenging the same, Second Appeal was filed on 21.03.2016. The following substantial questions of law were framed:

*“(i) Whether the decision of the first appellate Court without considering the additional documentary evidence filed under Order 41 Rule 27 of C.P.C in I.A.No.560 of 2004 is vitiated and liable to be set aside and that too when the petition to receive the same was allowed?*

*(ii) Whether the Courts below are right in coming to a conclusion that the plaintiffs/appellants had not proved the execution of the settlement deed dated 17.08.1961 marked as Ex.A.1 when the same was already upheld in an earlier suit in O.S.No.205 of 1968 on the file of the Sub Court, Trichy? And*

*(iii) Whether the decision of the first appellate Court without considering the reply statement filed and closing the application to receive the same in I.A.No.559 of 2004, is vitiated and liable to be set aside?”*



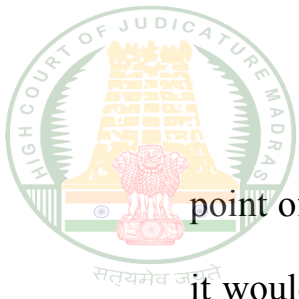
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3.The learned counsel appearing for the appellants submitted that he would be satisfied if an order of remand is made. He points out that the appellants filed I.A.No.560 of 2004 under Order 41 Rule 27 of CPC for reception of additional evidence. The details of documents sought to be received as additional evidence are as follows:

- i) Complaint in O.S.No.205 of 1968
- ii) Suit registered in O.S.No.205 of 1969
- iii) Complaint in O.S.No.48 of 1946

This said Interlocutory Application was allowed on 31.10.2005. The contentions of the learned counsel for the appellants is that the impugned judgment passed on 08.12.2005 does not make any reference either to I.A.No.560 of 2004 or to the aforementioned three documents. This according to the appellants' counsel is a clear breach of the procedure laid down under Order 41 Rule 27 of CPC. On this ground he wants this Court to set aside the impugned judgment and decree.

4.Per contra, the learned counsel for the respondents raised a pertinent submission. They pointed out that the appellants having kept quiet after the allowing of I.A.No.560 of 2004 cannot be allowed to take advantage of their own wrong. They pointed out that the suit was instituted way back in the year 1993. The respondents had succeeded in both the Courts below. The learned counsel submitted that if remand is made at this



point of time and the first appellate Court is called upon to revisit the issue, it would cause great miscarriage of justice. They called upon this Court to sustain the impugned judgments and decrees and dismiss the second appeal.

5.I carefully considered the rival contentions and went through the evidence on record.

6.Order 41 Rule 27 of CPC reads as follows:

***“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 any 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.*



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

Order 41 Rule 28 states that 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 Sub Court to take such evidence and to send it to the appellate Court.

7. Statutory mandate is cast on the appellate Court to decide on a particular course of action in such cases. In this case, the appellants cannot be blamed as if they were remiss or inactive. Having allowed the application under Order 41 Rule 27 of CPC, the appellate Court was obliged to formally record evidence. If the appellate Court was of the view that evidence need not be taken, then the documents allowed to be received as additional evidence ought to have been marked as exhibits. In the instant case, the first appellate Court did not even refer to the allowing of I.A.No. 560 of 2004. No mention has been made about the three documents sought to be received as additional evidence. I am more than satisfied that the omission to refer to additional evidence clearly vitiates the impugned judgment. The first substantial question of law is answered in favour of the appellants.



S.A.(MD)No.180 of 2013

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8. In this view of the matter, the impugned judgment and decree of the first appellate Court is set aside. The matter is remitted to the first appellate Court. The first appellate Court follow the procedure set out in Order 41 Rule 28 of C.P.C. So that the three documents that were annexed to I.A.No. 560 of 2004 are marked. After hearing both sides, the appeal itself will be disposed of on merits and in accordance with law within a period of three months. When the additional documents are marked through any one of the legal heirs of the third appellant, the respondents herein are at liberty to cross examine the said witness. The third respondent had passed away during the pendency of the second appeal. Notice has to be necessarily issued to the legal heirs of the deceased third respondent herein.

9. This Second Appeal is allowed accordingly. There shall be no order as costs.

**29.10.2024**

Internet : Yes/No  
Index : Yes/No  
NCC : Yes/No  
MGA

To

1. II Additional Subordinate Judge, Tiruchirapalli.

2. II Additional District Munsif Court, Tiruchirapalli.

<https://www.mhc.tn.gov.in/judis>



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**G.R.SWAMINATHAN.J.,**

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Copy To  
The Section Officer,  
Vernacular Records,  
Madurai Bench of Madras High Court,  
Madurai.

Judgment made in  
S.A.(MD)No.180 of 2016

29.10.2024