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SMT. SARADA AND ORS.

v.

MANIKKOTH KOMBRA RAJENDRAN

APRIL 22, 1996

B

[K. RAMASWAMY AND G.B. PATTANAİK, JJ.]

Code of Civil Procedure, 1908 :

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Order 41, Rule 27—Additional evidence—Filing of—Property sold as a collateral security—Subsequent agreement mentioning receipt of consideration—Appellate court refusing to take the document as additional evidence—Held : Appellate court ought to have received the additional evidence and considered the effect thereof by either recording the evidence of the parties or calling a finding on it from the trial court—Without that it would not be possible to render fair justice between the parties—Appeal remitted back to the appellate court to follow the procedure and dispose of the appeal in accordance with law.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7739 of 1996.

E

From the Judgment and Order dated 4.8.95 of the Kerala High Court in S.A. No. 886 of 1990-E.

B.V. Deepak and G. Frakash for the Appellants.

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The following Order of the Court was delivered :

Though the respondent has been served, he is not appearing either in person or through counsel.

Leave granted.

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The admitted position is that one T. Sekharan was the owner of the property. He sold 17 cents of land under Ex. A-2, dated 14.7.1982. He was impleaded as the first defendant in the suit laid for recovery of the possession on the ground that after the sale there was an contemporaneous agreement to permit the respondent to remain in possession for a period

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of four months and on expiry thereof, he was to surrender his possession.

Since he had not surrendered the possession, notice Ex. A/4, was issued on December 10, 1982 and on his failure to vacate the same, suit was laid for recovery of possession. Since the first defendant died, the appellants were brought on record as party defendants to the suit. It is their case that the respondent is a money-lender and the property sold was to obtain a loan and he had obtained the sale deed as a collateral security for repayment of the loan of a sum of Rs. 20,000. After the dispute had arisen, there was an agreement entered by the first defendant and the respondent in the presence of the Sub-Inspector of Police which formed part of the agreement, which reads as under :

"Agreement executed BETWEEN 'A' PARTY, Rajendran, 42 years, son of Manikooth Kombra Chalil Damodaran. Kacheri Amson, AND 'B' Party, Sekharan, aged 60 years, son of Thaikandy Gopalaln, Amarasserri Amson Desom.

Whereas A party had given a complaint before the Kakkur Police Station upon the B Party not acting in accordance with the agreement whereby the Parammel property owned by B party had been sold to A party, and whereas both parties spoke under the mediation of the station Sub-Inspector; and

Whereas the parties have jointly agreed to the terms stated below and have accordingly executed this agreement in the presence of the witnesses who have signed below this the 4th day of January, 1983 and retained one copy each of this agreement.

It is agreed :-

That B party shall pay A party Rs. 35,000 (Rupees Thirty Five Thousand only) on or before and that the Parammal property in the possession of A party shall then be given to B party at his expense. If the B party acts contrary thereto, he should vacate and hand over the above said Parammel property to A party. Further, A Party will have the right against B party to take steps in accordance with law."

The trial Court decreed the suit accepting that Ex. A-2 is a sale and the appellants are liable to surrender possession as sub-lessees. In the appeal, the appellants raised the issue regarding the agreement referred to

A hereinbefore and sought to place this document as an additional evidence under Order 41, Rule 27 CPC etc. The appellate Court rejected the same. In the second appeal, the High Court has dismissed the appeal confirming the decree for possession. Thus, this appeal by special leave.

B Since it is the case of the appellants that T. Sekharan had sold the property as a collateral security and when the agreement subsequently entered into clearly mentioned receipt of Rs. 35,000 as consideration of the property, it would indicate that the parties had the sale Ex. A-1 is only as a collateral security. Under these circumstances, the appellate Court ought to have received the agreement dated January 4, 1983 as additional evidence and considered the effect thereof by either recording the evidence of the parties or calling a finding in this behalf from the trial Court. Without receipt of the document and the evidence in consideration thereof, it would not be possible to render fair justice between the parties.

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D The appeal is accordingly allowed. The judgment and decree of the appellate Court as well as the High Court is set aside and the appeal is remitted to the appellate Court to follow the procedure indicated hereinabove and dispose of the appeal according to law. No costs.

G.S.

Appeal allowed.