

P.Mani Vs. M.Sangeetha

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Court : Chennai

Decided On : Jul-09-2013

Judge : G.Rajasuria

Appellant : P.Mani

Respondent : M.Sangeetha

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS Dated:09.7.2013 Coram The Honourable Mr.Justice G.RAJASURIA S.A.No.516 of 2013 and M.P.No.1 of 2013 P.Mani ..Appellant versus 1.M.Sangeetha 2.M.Deepa ...Respondents This second appeal is directed against the judgment and decree dated 3.10.2012 passed by the Principal Subordinate Judge, Thiruvannamalai, in confirming the judgment and decree dated 26.11.2010 passed by the Principal District Munsif, Thiruvannamalai, in O.S.No.429 of 2008.

For Appellant : Mr.S.Baskaran

JUDGMENT

This Second appeal is focussed by the defendant animadverting upon the judgment and decree dated 3.10.2012 passed by the Principal Subordinate Judge, Thiruvannamalai, in confirming the judgment and decree dated 26.11.2010 passed by the Principal District Munsif, Thiruvannamalai, in O.S.No.429 of 2008, which was one for partition.

2.

The parties are referred to hereunder according to their litigative status and ranking before the trial Court.

3. Compendiously and concisely the germane facts absolutely necessary for the disposal of this Second Appeal, would run thus: (a) The respondents herein, as plaintiffs, filed the suit seeking partition of the twelve items of the suit properties found described in the schedule of the plaint by averring that the plaintiffs, namely, Sangeetha(P1) and minor Deepa(P2)-represented by her mother Angammal, are the daughters of the defendant-Mani.

The defendant is in possession and enjoyment of those suit properties which are the ancestral properties, and that they are entitled to their aliquot shares, so to say, 1/3rd share each, totally 2/3rd share in the plaint scheduled properties.

(b) Whereas the defendant filed the written statement challenging and impugning the averments in the plaint, the warp and woof of the same would run thus:

(i) There was absolutely no conjugal relationship between the said Angammal-the mother of the plaintiffs 1 and 2, and the defendant.

(ii) Soon after the marriage between Mani-the defendant and Angammal, the latter refused to cohabit with the former on the ground that the defendant's father is suffering from dread skin decease.

As such there had been no possibility of the plaintiffs 1 and 2 being born to the couple Mani and Angammal.

(iii) The properties are the self-acquired properties of defendant and not the ancestral properties.

(iv) Ex-parte decree of divorce was obtained by the defendant as against Angammal as early as 28.6.1990 and the second plaintiff-Deepa was born on 10.4.1993 and hence even by phantasmagorical thoughts, Deepa could not be the daughter of Mani.

Accordingly, the defendant would pray for the dismissal of the suit.

(c)Whereupon issues were set down by the trial Court for trial, during which, the fiRs.plaintiff and the natural guardian of the second plaintiff, namely, Angammal, examined themselves as P.W.1 and P.W.1 and marked Exs.A1 to A11.

The defendant examined himself as D.W.1 and marked Exs.B1 to B4.

(d)Ultimately the trial Court decreed the suit, as against which, the appeal was filed for nothing but to be dismissed by the fiRs.appellate Court, confirming the judgment and decree of the trial Court.

4.Being aggrieved by and dis-satisfied with the judgments and decrees of both the fora below the defendant filed this second appeal on various grounds and also suggesting the following substantial questions of law: ".i.Whether the presumption of Courts below that the respondents are the daughters of the appellant is against Section 112 of the Evidence Act?.

ii.Whether the Courts below are right in shifting the burden of proof on the appellant as the fiRs.respondent was born within 150 days from the date of marriage and the second respondent was born after 280 days from the date of divorce.

lii.Since, the appellant denied the knowledge whether the courts below are right in relying on the certified copies of Ex....., without calling for the original from the alleged purchaser and mortgagee.

iv.In view of the admission in the plaint that the respondent's mother lived with the appellant for a short span of time, whether the courts below are right in holding that the respondents are the daughters of the appellant on the basis of Transfer Certificates (Ex.B) and Registered deeds (Ex.8) alone.

v.Whether the courts below are right in shifting the burdens of proof on the appellant relating to panchayat held on 14.4.1987 as the fiRs.respondent was born on 6.5.1987.

vi.Since, the plaintiffs valued the suit under Section 37(2) of the Tamil Nadu Court Fees and Suits Valuation Act, whether the courts below are right in giving equal

share to the respondents the suit filed after 18 years from the date of grant of divorce.

vii. Whether the suit is maintainable without challenging the sale alleged to have been made and without impleading the purchaser.

(extracted as such) 5. The learned counsel for the appellant/defendant would pyramid his arguments, which could succinctly and precisely be set out thus: (i) Simply because in Ex.A6-the sale deed dated 11.9.1995 and Ex.A7-the mortgage deed dated 25.1.2000 the defendant represented Sangeetha-the fiRs.plaintiff while she was minor, that it does not mean that he acknowledged and accepted Sangeetha as his daughter.

Only for the purpose of responding positively to the demand of the purchaser in the sale deed-Ex.A6 and the creditor in Ex.A7-the mortgage deed, he was constrained to sign such deeds containing such averments and that would not mulct him with any liability.

(ii) The Transfer Certificates Ex.A9 dated 1.7.2008 and Ex.A10 dated 26.7.2006 do not bear the signatures of the defendant Mani, but they only bear the signatures of Angammal.

(iii) Ignoring the preponderance probabilities, both the Courts below, out of sympathy, simply decreed the suit, warranting interference in second appeal.

6. At the outset itself, I would like to fumigate my mind with the following decisions of the Honourable Apex Court: 2012(8) SCC148[Union of India v.

Ibrahim Uddin and another].; an excerpt from it would run thus: ".59.

Section 100 CPC provides for a second appeal only on the substantial question of law.

Generally, a second appeal does not lie on question of facts or of law.

In SBI v.

S.N.Goyal (2008) 8 SCC92 this Court explained the terms ".substantial question of law".

and observed as under: (SCC p.103, para 13) ".13.....The word ".substantial".

prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties.

'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the partiesany question of law which affects the final decision in a case is a substantial question of law as between the parties.

A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law.....There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case."

48.To sum up on the issue, it may be held that an application for taking additional evidence on record at a belated stage cannot be filed as a matter of right.

The court can consider such an application with circumspection, provided it is covered under either of the prerequisite conditions incorporated in the statutory provisions itself.

The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the Court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court.

In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on

record, however, the court must record reasons as on what basis such an application has been allowed.

However, the application should not be moved at a belated stage.

7. In the same precedent, the following decisions are found referred to: (1) AIR 1962 SC3314 [Chunilal V.

Mehta & Sons Ltd. v. Century Spg.

and Mgf.

Co. Ltd.]. (2) (2011) 1 SCC673 [Vijay Kumar Talwar v.

CIT]. (3) AIR 1947 PC19 [Bibhabati Devi v.

Kumar Ramendra Narayan Roy]. (4) (1949) 17 ITR269 (Nag) [Suwalal Chhogalal v.

CIT]. (5) AIR 1957 SC852 [Oriental Investment Co. Ltd. v. CIT]. (6) AIR 192 SC1604 [Jagdish Singh v.

Natthu Singh]. (7) (1996) 5 SCC353 [Parativa Devi v.

T.V. Krishnan]. (8) (1998) 6 SCC423 [Satya Gupta v.

Brijesh Kumar]. (9) AIR 2000 SC534 [Ragavendra Kumar v.

Firm Prem Machinery & Co.]. (10) AIR 2000 SC1261 [Molar Mal v.

Kay Iron Works (P) Ltd.]. (11) (2010) 11 SCC483 [Bharatha Matha v.

R. Vijaya Renganathan]. (12) (2010) 12 SCC740 [Dinesh Kumar v.

Yusuf Ali]. (13) (2002) 3 SCC634 [Jai Singh v.

Shakuntala]. (14) (2008) 12 SCC796 [Kashmir Singh v.

Harnam Singh]. 8. A mere running of the eye over the above precedents would connote and denote, exemplify and demonstrate that unless there is any

substantial question of law is involved, the necessity of upsetting the findings of the courts below would not arise.

9.Keeping in mind the dictum as found enunciated in the aforesaid precedents of the Supreme Court, I would like to analyse the records.

10.A mere running of the eye over the decisions of both the fora below would highlight and spotlight the fact that the Courts below threadbare discussed the pros and cons of the matter and gave an unambiguous finding on facts to the effect that the plaintiffs 1 and 2 were born to the defendant-Mani and Angammal.

Unless there is any perversity or illegality, this Court in second appeal would not be justified in interfering with such finding.

11.The Courts below, placing reliance on Exs.A6 and A7 the registered documents would point up and show up that pulling no punches the defendant categorically and plainly, acknowledged and proclaimed the fiRs.plaintiff-Sangeetha as his daughter and also he recognised her as one of the co-sharers in the properties concerned.

12.Section 92 of the Indian Evidence Act, is squarely applicable in the facts and circumstances of this case.

However, the defendant would try to gloss over such commitment in black and white by putting forth a plea unsuccessfully and unconvincingly that because the purchaser under Ex.A6-the sale deed and the creditor under Ex.A7-the mortgage deed insisted the defendant-Mani that minor Sangeetha also should be added as one of the executants, he did choose to do so.

13.At this juncture, I recollect the well known legal adages 'the witnesses might lie, but the circumstances would not do so' and 'the preponderance of probabilities would govern the adjudication in civil cases'.

According to the defendant, soon after the marriage on 5.12.1986, the said Angammal left the defendant in the lurch and there was no conjugal connection between the two.

If that be so, I am at a loss to understand as to how the defendant could venture to put forth a plea that because the purchaser and the creditor respectively demanded him to add the fiRs.plaintiff-Sangeetha also as a party, he did choose to add Sangeetha as one of the parties in Exs.A6 and A7.

14.In fact such circumstances bespeak and betoken that the plea of the defendant is nothing but a load of balony fraught with falsity and that the villagers there believed Sangeetha as the daughter of the defendant and that was why they insisted for her being added as a party to those documents.

15.Both the Courts below, placing reliance correctly on those exhibits held that the defendant and Angammal in fact lived together and only as an after thought, the defendant did choose to resile from his stand and started disputing the parentage of the plaintiffs.

Scarcely could it be stated that the defendant who was the alleged estranged husband of Angammal, picked up the fiRs.plaintiff-Sangeetha, who was allegedly not his biological daughter, and cited along with him in Exs.A6 and A7 as co-sharer of the properties concerned.

No man having head over shoulder would ever venture to pick up a stranger girl as his daughter and sell his own property citing her as his daughter cum co-sharer unless the said girl happened to be his own daughter.

16.The learned counsel for the appellant/defendant, by placing reliance on the ex-parte decree of divorce as contained in Ex.B1 dated 28.6.1990, would develop his submission to the effect that after the ex-parte decree of divorce on 28.6.90, the birth of the second plaintiff on 10.4.91 would speak volumes that she could not be the daughter of the defendant-Mani.

17.At this juncture I recollect and call up the maxims (i)'Allegans contraria non est audiendus' A person making contradictory allegations is not to be heard; (ii)'Affirmanti, non neganti, incumbit probatio' The proof is incumbent on the one who affirms.not on the one who denies.

(iii)'Probandi necessitas incumbit illi qui agit' - The necessity of proving rests on the one who sues (or claims some right) 18.All those sister maxims would exemplify and demonstrate that the burden of proof is on the defendant to prove his plea.

But on the other hand, the plaintiffs, by relying upon the aforesaid documents and also the various circumstances established before the Court, canvassed their case.

But in order to torpedo and to make mincemeat of such documents and circumstances as stood evidenced in the evidence on the plaintiffs' side, no steps were taken by the defendant.

19.The fiRs.appellate Court also appropriately and correctly commented upon the conduct of the defendant by pointing out that if at all the defendant was not the real father of the plaintiffs 1 and 2, he could have very well taken medical expert's assistance in that regard, but for reasons best known to him, he had not chosen to do so.

20.The trial Court as well as the fiRs.appellate Court correctly pointed out that no independent witness has been examined before the Court for the purpose of highlighting that there was no cohabitation between the defendant-Mani and Angammal.

21.I also recollect the maxim: 'In re dubia magis infitatio quam affirmatio intelligenda' In a doubtful matter, the negation is to be understood rather than the affirmation.

As such, the defendant who took certain pleas, miserably failed to establish his plea and thereby both the Courts below were justified in drawing adverse inference as against the defendant.

22.To the risk of repetition and pleonasm but without being tautologous, I would like to point out that the defendant himself admitted in those registered deeds, to wit, Exs.A6 and A7 that the properties are the ancestral properties in his hands.

As per the Hindu Succession (Amendment) Act, 2005 (Tamil Nadu Act 1 of 1990) and the decision of the Honourable Apex Court reported in 2011 (9) SCC788[Ganduri Koteshwaramma and another versus Chakiri Yanadi and another]., of which certain excerpts from it would run thus: ".11.

The new Section 6 provides for parity of rights in the co-parcenary property among male and female members of a joint Hindu family on and from 9.9.2005.

The legislature has now conferred substantive right in favour of the daughter. According to the new Section 6, the daughter of a co-parcener becomes a co-parcener by birth in her own rights and liabilities in the same manner as the son.

The declaration in Section 6 that the daughter of the co-parcener shall have same rights and liabilities in the co-parcenary property as she would have been a son in unambiguous and unequivocal.

Thus on and from 9.9.2005, the daughter is entitled to a share in the ancestral property and is a co-parcener as if she had been a son.

12.

The right accrued to a daughter in the property of a joint Hindu family governed by the Mitakshara law, by virtue of the 2005 Amendment Act, is absolute, except in the circumstances provided in the proviso appended to sub-section (1) of Section 6.

The excepted categories to which new Section 6 of the 1956 Act is not applicable are two, namely, (i) where the disposition or alienation including any partition has taken place before 20.12.2004; and (ii) where testamentary disposition of property has been made before 20.12.2004.

Sub Section (5) of Section 6 leaves no room for doubt as it provides that this section shall not apply to the partition which has been effected before 20.12.2004.

For the purposes of new Section 6 it is explained that ".partition".

means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 or partition effected by a decree of a court.

In light of a clear provision contained in the Explanation appended to sub-section (5) of Section 6, for determining the non-applicability of the section, what is relevant is to find out whether the partition has been effected before 20.12.2004 by deed of partition duly registered under the Registration Act, 1908 or by a decree of a court.

In the backdrop of the above legal position with reference to Section 6 brought in the 1956 Act by the 2005 Amendment Act, the question that we have to answer is as to whether the preliminary decree passed by the trial court on 19.03.1999 and amended on 27.09.2003 deprives the appellants of the benefits of the 2005 Amendment Act although final decree for partition has not yet been passed.

13.

The legal position is settled that partition of a joint Hindu family can be effected by various modes, inter alia, two of these modes are (one) by a registered instrument of a partition and (two) by a decree of the court.

In the present case, admittedly, the partition has not been effected before 20.12.2004 either by a registered instrument of partition or by a decree of the court.

The only stage that has reached in the suit for partition filed by Respondent 1 is the determination of shares vide preliminary decree dated 19.3.1999 which came to be amended on 27.09.2003 and the receipt of the report of the Commissioner.

14.

A preliminary decree determines the rights and interests of the parties.

The suit for partition is not disposed of by passing of the preliminary decree.

It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds.

After the passing of the preliminary decree, the suit continues until the final decree is passed.

If in the interregnum i.e. after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree re-determining the rights and interests of the parties having regard to the changed situation,".

a fortiori the daughters are entitled to shares in the ancestral property and accordingly the plaintiffs 1 and 2 are entitled to 1/3rd share each in their favour i.e. totally 2/3rd share in the entire suit properties and both the Courts below correctly decided the lis, warranting no interference in second appeal.

There is no substantial question of law involved in the matter.

23. Both the Courts below convincingly dealt with the matter, warranting no interference in second appeal.

There is no merit in the second appeal and accordingly, it is dismissed.

However there is no order as to costs.

Consequently connected miscellaneous petition is dismissed.

Ms.09.07.2013 To 1.The Principal Subordinate Judge, Thiruvannamalai 2.The Principal District Munsif, Thiruvannamalai G.RAJASURIA,J.

Ms.S.A.No.516 of 2013 09.7.2013

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