

Sivan Naicker Vs. Subbu Naicker

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Court : Chennai

Decided On : Mar-26-2014

Judge : G.Chockalingam

Appellant : Sivan Naicker

Respondent : Subbu Naicker

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED: 26.03.2014 CORAM THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM S.A.(MD)No.74 of 2006 and CMP(MD)No.605 of 2006 Sivan Naicker : Appellant/Plaintiff versus Subbu Naicker : Respondent/Defendant Prayer This second appeal filed under Section 100 of CPC against the judgment and decree passed in A.S.No.41 of 2005 on the file of the I Additional Subordinate Judge, Tirunelveli, dated 31.08.2005, reversing the judgment and decree passed in O.S.No.109 of 2000, on the file of the Principal District Munsif Court, Valliyoor, dated 30.09.2004 !For Appellant : Mr.G.Venugopal for G.Prabhurajadurai ^For Respondent : Mr.A.Arumugam :

JUDGMENT

Challenge in this second appeal is to the judgment and decree, dated 31.08.2005 passed in A.S.No.41 of 2005 by the I Additional Subordinate Judge, Tirunelveli, reversing the judgment and decree passed in O.S.No.109 of 2000 on the file of the Principal District Munsif, Valliyoor, dated 30.09.2004.

2.The appellant herein as plaintiff has instituted Original Suit No.109 of 2000 on the file of the trial Court seeking the relief of partition, wherein the present respondent has been shown as defendant.

3.It is averred in the plaint that the suit property originally belonged to the mother of the plaintiff and the defendant and that the plaintiff and the defendant are the only legal heirs of the deceased Mrs.Chellammal.

The plaintiff is residing in the front side of the house and the defendant is residing at the back side of the house.

Since, the defendant happened to be the eldest member of the family and as there is no division of the property, tax in respect of the house stands in the name of the defendant.

Similarly, the electric service connection is also stands in the name of the defendant.

The defendant is not having any issue.

Since the defendant is borrowing loan and spending money for his wife's relatives.

On 03.04.2000, the defendant had issued notice to the plaintiff, for which a suitable reply was given on 15.04.2000.

Hence, the plaintiff has filed a suit claiming partition in the suit property.

4.In the written statement filed on the side of the defendant, it is averred as follows:- The defendant had admitted the relationship and the plaintiff's right to equal share.

But on 22.04.1996 in the presence of the village elders there was an oral partition held between them and possession was delivered to the respective parties.

On that basis, the defendant had spent Rs.20,000/- and replaced the roof of the house by tiles.

The electricity service connection was also updated in the name of the defendant.

In fact, the defendant was having 100 sheeps, which is worth about Rs.2,00,000/ and therefore, there was no necessity to borrow loan.

Hence, he prayed for the dismissal of the suit.

5.The trial court, after considering the rival evidence adduced on either side, has partly decreed the suit.

Against the judgment and decree passed by the trial court, the defendant as appellant has preferred A.S.No.41 of 2005 on the file of the fiRs.appellate court.

The fiRs.appellate court, after hearing both sides and upon reappraising the evidence available on record, has allowed the appeal and thereby set aside the judgment and decree passed by the trial court in O.S.No.109 of 2000.

Against the judgment and decree passed by the fiRs.appellate court, this second appeal has been preferred at the instance of the plaintiff as appellant.

6.At the time of admitting the present second appeal, the following substantial question of law has been formulated for consideration:- ".Whether the findings of the lower appellate court is erroneous in the absence of admissible evidence to show that there was an oral partition of the property between the parties?.".

7.Before going into the merits of the case, it is necessary to narrate the admitted facts of this case.

8.It is admitted by both parties that the property in question was belonged to the mother of the plaintiff and the defendant.

It is also admitted that no document for partition was produced by the plaintiff and the defendant with regard to the suit property.

9.It is further admitted that the property in question is a vacant site and it was also accepted by the parties, in the presence of the Commissioner and the Commissioner has filed a report and plan, which were marked as Exs.C1 and C2 and no objection was filed by both parties for the above said Commissioner's report.

10.The learned counsel for the appellant/plaintiff argued that the property in question was not divided among the plaintiff and the defendant and it is in common enjoyment of both parties and the suit filed by the plaintiff seeking the relief of partition was decreed by the trial court, but the fiRs.appellate court, without appreciating the evidence of PW1 as a whole, has wrongly come to the conclusion that the property in question was divided among the brothers and therefore, the finding of the fiRs.appellate court is liable to be set aside.

11.The learned counsel for the appellant further argued that PW1 has deposed that his mother was having some other properties and that properties were partitioned and his definite case is that the suit property in question was not partitioned among the family membeRs.but without appreciating the evidence of PW1, the fiRs.appellate court has wrongly come to the conclusion that the suit properties were partitioned and therefore, findings of the fiRs.appellate court has to be set aside and the judgment and decree of the trial court has to be confirmed and the second appeal has to be allowed.

12.The learned counsel for the respondent/defendant argued that the fiRs.appellate court, after analysing the evidence of PW1, has correctly come to the conclusion that the property in question was partitioned among the plaintiff and the defendant and the same was also admitted by the plaintiff in his evidence.

Hence, the fiRs.appellate court has allowed the appeal filed by the respondent/defendant and there is no need to interfere with the findings of the fiRs.appellate court and therefore, prays for the dismissal of the second appeal.

13.The learned counsel for the respondent/defendant further argued that since the question of fact already decided by the fiRs.appellate court is correct, this court has no power to modify the question of facts and therefore, the judgment and decree of the fiRs.appellate court has to be confirmed and the second appeal has to be dismissed with costs.

14.It is well settled law that in a suit for partition, both the plaintiff and the defendant are the sharers and they are treated as same footing even though the plaintiff filed a suit for partition.

15. According to the respondent/defendant, he can take contra plea in the suit.

The defendant can take contra plea in other cases, except in the suit for partition.

Since, the defendant has also treated as one of the plaintiff, the finding of the lower appellate court that the defendant can take contra plea is erroneous one and the same is liable to be set aside.

16. In this case, the fiRs. appellate court has come to the conclusion that PW1 admitted in his oral evidence that including the property standing in the name of his mother was divided, which is contrary to his own pleadings.

From the reading of the deposition of PW1 in detail, he has stated in his deposition that his father and mother having separate property in eastern side of their village and that property alone was partitioned.

17. Further, it is well settled principle of law that in coming to the conclusion if any one of the parties wants to rely upon the deposition of other party the said deposition has to be read as a whole and not to pick and choose some words here and there.

Hence, this court is of the view that PW1 categorically admitted that his mother is having so many properties and they are in various survey numbers and the property in question was not divided among the brotheRs. As per the above admission, it means only Nagaraj property situate on the eastern side of the village.

Hence, the fiRs. appellate court, without applying the basic principle of law, has wrongly given a finding as if the suit property is partitioned and therefore, this court is of the view that the same has to be set aside.

18. Therefore, from the above admission of PW1, it is made clear that the suit property in question was not partitioned and he further deposed that there are some other properties belonging to his mother and that property was partitioned among his brotheRs. Hence, without reading the whole deposition of PW1, the fiRs. appellate court pick and choose some words and wrongly come to the

conclusion that the suit property was partitioned among the brothers which cannot be accepted.

The defendant has issued suit notice, which was marked as Ex.A1, in which is has been stated as follows:- ".vd; fl;rpa[k; jh';fSk; rnfhjuh;fs;.

Totk;kd;gl;o tlf;Fj; bjUtpypUf;Fk; tPl;L vz;.44 (giHa vz;.3-1V) vd; fl;rpapd; jhahhpd; je;ij tHp g{h;tPf brhj;J MFk;.

mJ vd; fl;rpf;Fk; c';fSf;Fk; rkg';fhfg; ghj;jpag;gl;IJ.

nkW;go tPl;od; kjpg;g[:U/50,000/- vd kjpg;g PL bra;J.

mjpy; c';fs; g';fhd U:.25,000/- (U:gha; ,Ugj;jp le;J Mapuj;jpy;) U:/4,000/- ehd;F Mapuk; buhf;fKk;.

U:/3,000/- Mapuj;jpw;F kida[k; Mf U:/7,000/- Mapuk; Kd;gzkhf vd; fl;rpaplk; jh';fs; bgw;Wf;bfhz; Oh;fs; ,J rk;ke;khf ghf fpiua mf;fphpbkz;l; 11.10.1997 md;W rhl;rpfs; Kd;dpiyapy; gpwg;gpj;Jf;bfhLj;Js;sPh;fs;vd; fl;rp c';fSf;F nruntz;oa ghf;fp fpiuaj; bjhif :U:/18,000/- (Ugha; gjpbjdl;lhapuj;ij) jahuhf itj;JJs;shh;/ nkW;go bjhifiag; bgw;Wf;bfhz;L xg;ge;jgo ek; fl;rpf;F fpiuak; gjpt[bra;J bfhLf;Fk;go nfl;Lf;bfhs;sg;gLfpwPh;fs;".

19.But in the deposition of DW1 and in the written statement filed by the defendant, the defendant has not stated the above facts and the defendant in his written statement has stated that:- cga thjpfspd; jhahh; bry;yk;khSf;F jhth brhj;J cl;gl i&fpuhkj;jpy; gy;ntW brhj;Jf;fs; ,Uf;fpwJ.

i& bry;yk;khs; fhyk; brd;w gpd;g[i&ahhpd; brhj;Jf;fis ghfk; ghpf;f ntz;Lk; vd;W ,e;j thjp mof;fo ,g;gpupthjpia nfl;Lf; bfhz;ljpy; mog;gilapy; Ch; bghpath;fs; Kd;dpiyapy; g".;rhaj;J ngrp tha;bkhHpahf 22.04.1996k; nijp jgry; brhj;J cl;gl midj;J brhj;Jfisa[k; tha;bkhHpahf ghfk; gphpj;J mtuth; ghfj;jpd; RthjPdk; kw;wth;fshy; xg;gilt[bra;ag;gl;L tpl;IJ.

20.Contrary to the above two statements given by the defendant, in his cross examination, he has stated that:- ...vd; jhahnu ghfg;ghptpid bra;J vdf;F kl;Lk; vd bfhLj;Jtpl;lhh;/ Mdhy; mjw;F Mjhuk; jhf;fy; bra;atpy;iy vd;why; rhpjhd;/ 21.So, in

order to prove the alleged oral partition on 22.04.1994, the defendant has not produced any evidence.

22.Further, even though the defendant admitted that the plaintiff has agreed to sell his share to the defendant on payment of Rs.25,000/-.

But according to the defendant, he has not produced any agreement before this court.

But contrary to the above fact, the defendant deposed in his cross examination that during the life time of his mother she partitioned the property and allotted the entire property to the defendant also.

23.According to the defendant, there are three different pleas put forth regarding the suit for partition.

But the defendant has not produced any document before this court.

So, the argument of the learned counsel for the appellant/plaintiff that since the defendant is also treated as one of the plaintiff in the partition suit and regarding the partition, the defendant alleged that there was a oral partition before the elder of the family and subsequently, there was a oral agreement.

But contrary to the above, the defendant has stated that his mother allotted the entire property to him and the above three facts, which are contra to each other, are not proved.

So the argument of the learned counsel for the appellant/plaintiff that the suit property in question has not been partitioned between his brothers alone is acceptable one.

24.The Advocate Commissioner, in his report, has stated that the property in question was not entirely enjoyed by the defendant alone.

The Advocate Commissioner in his report (Ex.C1) has stated that the defendant is in enjoyment of some portions of the suit property also and for the Commissioner's report, there is no objection on either side.

25. In the Commissioner's report, in para 3 it has been stated that:- ".During my inspection, I found that the disputed house has two portions and in the northern portion, the plaintiff is residing and in the southern portion, the respondent is residing.

Between the two portions, there is a doorway lies in the middle of the east west wall.

During my inspection, it seems that both the parties are residing separately in their respective portions with their family.

On the northern side portion, there is a 'varanda' situated and after the 'varanda' on the northern side east-west 163/4 feet is kept as vacant and on the north side of the vacant side, there is a common cattle shed lies and both the parties with one Subbu Naicker, s/o.Sellamuthu Naicher are enjoying the same in common."

26. So, according to the Commissioner's report, the property in question was enjoyed by both parties.

Therefore, the argument of the learned counsel for the respondent/defendant that the property in question is not enjoyed by the plaintiff cannot be acceptable one.

27. In this case, according to the Commissioner's report, the plaintiff is also enjoying some portions in the suit property and hence, the question of joint possession of both the parties is also acceptable one.

The fiRs. appellate court, without considering the whole evidence of PW1 has come to a wrong conclusion that the property in question was divided among the brotheRs.28. Further, since it is the suit for partition and the alleged partition was not proved by the defendant, the plaintiff is entitled to half share in the suit property.

Hence, this court is of the considered view that the property in question is not divided among the brothers and the plaintiff is having half share in the suit property and entitled for partition.

29. The learned counsel appearing for the respondent/defendant has relied upon the following judgments in support of his contention:- 1.1999(III) CTC340 in the case of Kondiba Dagadu Kadam versus Savitribai Sopan Gujar, wherein it has been held that:- 'Scope of Second Appeal after Amendment of Code in 1976 - Right of Appeal is neither natural nor inherent right attached to litigations - Being substantive right it has to be regulated in accordance with law in force at relevant time - Conditions mentioned in Section has to be strictly fulfilled before Second Appeal can be maintained and court would not enlarge or add to grounds - Second Appeal cannot be decided on mere equitable grounds and concurrent findings of lower courts howsoever erroneous cannot be disputed.

Powers of court in second appeal after Amendment of Code in 1976 - Second Appeal could be maintained only on substantial question of law - Substantial question of law to be distinguished from substantial question of fact - High Court not to investigate grounds on which FiRs.Appellate Court arrived at findings - FiRs.Appellate Court rejecting witnesses accepted by Trial court is not ground for interference in Second Appeal when FiRs.Appellate Court has given sufficient reasons for it - When two inferences are possible, one drawn by FiRs.Appellate Court, is binding on High Court - Deviation from this approach is not permissible - High Court not to substitute its opinion for opinion of FiRs.Appellate Court unless conclusions drawn by the FiRs.Appellate court (a) were erroneously being contrary to mandatory provisions of law applicable or (b) contrary to settled position on basis of pronouncements made by Supreme Court or [c].was based upon in admissible evidence or (d) arrived at without evidence.

Substantial question of law - what are not -(a) Mere wrong application of law as decided by Larger Bench of concerned High Court, or, by Privy Council or, by Federal Court or, by Supreme Court, by FiRs.Appellate Court on facts of case is not substantial question of law - (b) when point of law is not pleaded or found to be arising between parties without any factual format, no substantial question of can be raised - [c].Mere appreciation of facts documentary evidence or meaning of entries and contents of documents cannot be held to be substantial question of law - (d) Exercise of discretion by FiRs.Appellate Court in judicial manner cannot be substantial question of law.

Substantial question of law - FiRs.Appellate Court Assuming jurisdiction where it did not vest in it is substantial question of law.

2.2013(3) CTC550 in the case of Nasib Kaur and others versus Col.

Surat Singh (Deceased) through L.Rs.& otheRs.wherein it has been held as follows:- Second Appeal - Approach of High Court - Substantial question of law - Whether justified - Suits for declaration and injunction dismissed till stage of FiRs.Appel - High Court in Second Appeal framing substantial question of law to effect that to determine whether Courts below had ignored material evidence - High Court deciding Second Appeal by re-appreciating entire evidence - High Court not pointing out any lacunae in appreciation of evidence by Lower Courts - High Court decreeing Suit for declaration, recovery of possession and injunction, when possession in favour of defendants was established.

- Held, when core issue of possession was decided by FiRs.Appellate Court against plaintiffs, no substantial question of law arose for decision of High Court in Second Appeal - Decree of High Court set aside - Appeals allowed.

30.In the case on hand, according to the admission of the defendant, since it is a suit for partition and the defendant has alleged that the suit property was partitioned among brothers and it is not proved by the oral or documentary evidence and therefore, the fiRs.appellate court, by applying wrong principle of law, has come to the conclusion.

Hence, the judgment and decree of the fiRs.appellate court has liable to be set aside.

31.In view of the discussions made earlier, the ruling cited by the learned counsel for the respondent/defendant are not applicable to the facts of the present case.

32.The substantial question of law is answered accordingly.

33.In the result, this second appeal is allowed and the judgement and decree of the fiRs.appellate court are set aside and the judgment and decree of the trial court are confirmed.

Considering the facts and circumstance of the case, both parties are directed to bear their own costs.

Consequently connected Miscellaneous Petition is closed.

er/jrl To, 1.The I Additional Sub Court, Tirunelveli.

2.The Principal District Munsif, Valliyoor.

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