

Sivalingam Vs. Somu

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Court : Chennai

Decided On : Jun-03-2013

Judge : G.Rajasuria

Appellant : Sivalingam

Respondent : Somu

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED:03.06.2013
Coram: THE HONOURABLE MR.JUSTICE G.RAJASURIA S.A.No.337 of 2013
and M.P.No.1 of 2013 Sivalingam .Appellant versus 1.Somu 2.Theerthamalai
3.Tamilselvi .Respondents Second appeal is directed against the judgement and
decree dated 24.1.2012 passed by the Sub Court, Harur, in A.S.No.36 of 2011
confirming the judgement and decree dated 22.7.2011 passed by the learned
District Munsif, Harur in O.S.No.50 of 2009.

For Appellant : Mr.T.Murugamanickam

JUDGMENT

This second appeal is focussed by the plaintiff, inveighing the judgement and
decree dated 24.1.2012 passed by the Sub Court, Harur, in A.S.No.36 of 2011,
confirming the judgement and decree dated 22.7.2011 passed by the learned
District Munsif, Harur in O.S.No.50 of 2009, which is one for partition.

2.

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

3.

A summation and summarisation of the germane facts absolutely necessary for the disposal of this second appeal would run thus: The appellant herein, as plaintiff, filed the suit seeking partition of the immovable properties described in the schedule of the plaint and for allotment of half share in his favour.

4.The gist and kernel of the averments in the plaint could tersely and briefly be set out thus: (i)The properties described in the schedule of the plaint are the joint family ones belonging to the joint family comprised of the plaintiff-Sivalingam and his brother-Somu(fiRs.defendant) and their deceased father Jambulinga Mudaliar.

(ii)During the life time of Jambulinga Mudaliar, those three coparceners got the properties partitioned and entered into a Muchilikka.

However those properties were agreed to be kept in abeyance without implementing the Muchilikka.

(iii)During the life time of Jambulinga Mudaliar himself, after that Muchilikka, a registered partition deed(Ex.A2 dated 9.3.1994) emerged, except for item No.2 and in that, item No.2 was not found set out.

The registered partition was only a partial one and not a full-fledged partition.

(iv)However, the fiRs.defendant sold certain items of properties in favour of defendant Nos.2 and 3.

Hence the suit.

5.Inveighing and challenging, disputing and contradicting the averments in the plaint, the fiRs.defendant filed the written statement, which was adopted by D2 and D3, resisting the suit on various grounds, which could succinctly and precisely be set out thus: (a)The second item of the suit properties was not included in the registered partition deed-Ex.A2 dated 9.3.1994 and the understanding was that

the left out item, namely, the second item, which happened to be the self acquired property of Jambulinga Mudaliar, should be divided equally among the seven children of Jambulinga Mudaliar, so to say, his two sons, namely, the plaintiff and D1, and his five daughters who are not parties to the suit.

(b) After the death of Jambulinga Mudaliar, partition was effected in respect of the II item of the suit property and the patta came to be stood in the name of all the legal heirs of the deceased Jambulinga Mudaliar, as per their shares.

(c) The I item of the suit properties, viz., the land bearing Survey No.94/1 is measuring an extent of 3 acres and 4 cents, of which an extent of 92 cents of land was allotted to Jambulinga Mudaliar-the father of the plaintiff and D1, and the plaintiff and D1 were allotted one acre each, and 12 cents of Well was retained in common.

(d) It was agreed that after the death of Jambulinga Mudaliar, the 92 cents allotted in his favour should be divided equally between the plaintiff and D1 and it was divided so and patta also was obtained accordingly.

(e) Item No.3 of the suit properties was allotted under the partition deed, exclusively to defendant No.1.

Ultimately, D1 sold in favour of D2 and D3 certain portions allotted to him in the partition.

(f) The suit is a misconceived one.

Accordingly, D1 would pray for the dismissal of the suit.

6. Whereupon issues were framed.

Up went the trial, during which, the plaintiff examined himself as P.W.1 and marked Exs.A1 to A3.

The first defendant examined himself as D.W.1 along with D.Ws.2 to 4 and marked Exs.B1 to B5.

7.Ultimately, the trial Court dismissed the suit, as against which, the appeal was filed for nothing but to be dismissed by the fiRs.appellate Court, confirming the judgement and decree of the trial Court.

8.Challenging and impugning the judgements and decrees of both the Courts below, this second appeal has been focussed on various grounds and also suggesting the following substantial question of law: ".When certain properties have not been mentioned in a family partition deed, whether it will not amount to a presumption, that, such omitted properties are still partible?".

(extracted as such) 9.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."

(emphasis added) 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.

State of consideration 49.

An application under Order 41 Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved.

The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for

adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgement or for any other substantial cause.

The true test, therefore is, whether the appellate court is able to pronounce judgement on the materials before it without taking into consideration the additional evidence sought to be adduced.

Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court (vide Arjan Singh v.

Kartar Singh and Natha Singh v.

Financial Commissioner., Taxation-(1976).SCC28: AIR 1976 SC1053" 10.

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) AIR192SC1604[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].11.Accordingly, keeping the aforesaid dictum in mind, I proceed to analyse the records to find out as to whether any substantial question of law is involved in this matter.

12.The relationship among the parties is an undisputed one.

The learned counsel for the appellant/plaintiff would submit that relating to item Nos.1 and 3 are concerned, there could be no dispute.

However, he would stress upon the fact that item No.2 was left out in the registered partition deed-Ex.A2 and it has to be partitioned between the plaintiff and D1 as per Ex.A1-the Muchilikka.

13.Ex.A1-the Panchayat Muchilica would refer to the fact that the said item No.2, after the death of Jumbulinga Mudaliar, should be divided between the plaintiff and D1 and that fact was not taken note of by the Courts below.

14.A bare perusal of the judgements of both the Courts below would connote and denote that they threadbare discussed the documents filed and the evidence adduced before them.

The records would highlight and establish that the item No.2 was divided into seven shares, so to say, among the aforesaid seven children of Jambulinga Mudaliar and each one was allotted a share and the patta also reflected the same, which is a finding of fact by the Courts below and the second appellate Court is not expected to interfere with the same, in the absence of any perversity or illegality.

15.The bedrock of the argument of the learned counsel for the appellant in second appeal is that the Muchilikka-Ex.A1 should be given effect to.

Even for argument's sake it is taken that Jambulinga Mudaliar, at that time, intended that after his death, that item No.2 should be divided between the plaintiff and D1, that cannot be taken as something part of the partition or the Will of Jambulinga Mudaliar.

16.In the subsequent registered partition-Ex.A2, there is no reference at all to such a version as claimed to have found set out in Ex.A1-the Muchilikka.

The conduct of the parties is of at most importance.

Both the Courts below, by referring to the Revenue records, as well as the evidence available, clearly held that the second item of the suit property was divided among the seven children of the said Jambulinga Mudaliar and that mutation engendered in the revenue records accordingly.

There is nothing to show as to why the plaintiff passively accepted and signed the partition deed Ex.A2 even though it did not cover the II item of the suit property.

The said partition deed Ex.A2 was not sought to be got set aside as per law adhering to law of limitation.

17.I recollect the maxim:'Ubi jus, ibi remedium' Where there is a right, there is a remedy.

18.Mere oral statement of the plaintiff would not in any way enure to his benefit and that would only be his ip se dixit.

19.Regarding item No.2 is concerned, there was no partition and there was no prior legally enforceable agreement capable of being implemented as such.

20.I would also incidentally proceed to observe that had there been any version in the registered partition deed-Ex.A2, which subsequently emerged to Ex.A1-the Muchilikka, to the effect that after the death of the father, his two sons should divide the item No.2 of the suit properties, then it could be taken that the partition agreed earlier was deferred till the death of the father.

But that is not the case here.

21.Once the Muchilikka-Ex.A1 was followed by the registered partition deed-Ex.A2, wherein there is no reference to item No.2, then the parties cannot fall back on a portion of the Muchilikka and insist for giving effect to that much extent and this is a very crucial point to be noted and not to be pooh-poohed or belittled, slighted or discarded as a pococurante one.

22.The Courts below, taking into account the evidence both oral and documentary decided the lis.

So far item No.2 is concerned, there was no partition and that it was divided equally among the children of Jambulinga Mudaliar.

23.A bare running of the eye over the records including the pleadings and the judgements of both the Courts below would exemplify and demonstrate that the second item of the suit properties, which is a house property with vacant land, even though was found referred to in Ex.A1-the Muchilikkaa, yet in the subsequent registered partition deed-Ex.A2, there was no reference at all to it.

24.The 92 cents of land in item No.1 of the suit properties, which was earlier allotted to the deceased Jambulinga Mudaliar, was partitioned between the plaintiff and D1, after the death of Jambulinga Mudaliar and the said fact was discussed in extenso by both the fora below that too with reference to patta.

No doubt patta alone will not confer title, but the emergence of patta and consequent enjoyment of the properties to the knowledge of the plaintiff would certainly fasten him with liability to honour the same.

25.Regarding item No.3 is concerned, both the Courts below gave a finding that as per the registered partition deed Ex.A2 dated 9.3.1994, it was allotted to D1.

26.Ex.B1-the proceedings of the Tahsildar, is found referred to by the appellate Court correctly to the effect that the second item of the properties was divided into seven shares, even prior to 2001, so to say, among the seven children of the deceased Jambulinga Mudaliar.

There is nothing to indicate that as against such division, the plaintiff agitated before the higher fora as per law and the suit itself was filed only in the year 2009 by the plaintiff for partition and such conduct of the plaintiff would dis-entitle him from seeking any relief by projecting a different set of facts.

27.The suit was filed by the plaintiff in a truncated manner as though the versions as found in the Muchilikka should be implemented etc., and that too, not only in respect of item No.2,but also in respect of item Nos.1 and 3, which were found reflected in the registered partition deed.

Both the Courts below took note of that fact also and found fault with the plaintiff.

In such a case, I could see no substantial question of law is involved in this case and no interference with the judgements and decrees of both the Courts below is warranted.

Accordingly, the second appeal is dismissed.

No costs.

Consequently, connected miscellaneous petition is dismissed.

Ms.To 1.

The Sub Court, Harur.

2.

The District Munsif Harur

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