

Jayamoorthy Vs. Palani

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Court : Chennai

Decided On : Jun-24-2013

Judge : P.R.Shivakumar

Appellant : Jayamoorthy

Respondent : Palani

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS Dated:

24. 06.2013 Coram: THE HON'BLE MR. JUSTICE P.R.SHIVAKUMAR S.A. No.1276 of 2010 1. Jayamoorthy 2. Kaliasammal 3. Kalyani .. Appellants ..vs..

1. Palani 2. Mayavathi 3. Natarajan 4. Adhisivam 5. Nagarajan 6. Vijaya 7. Vimala .. Respondents Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and decree dated 10.09.2009 made in A.S.No.32 of 1995 passed by the learned Additional Sub-Judge, Tindivanam thereby reversing the judgment and decree dated 31.03.1995 made in O.S.No.607 of 1989 passed by the learned Additional District Munsif, Tindivanam. For Appellant ... Mr.S.Sathish Rajan For Respondent ... Mrs.Usha Raman

JUDGMENT

This second appeal has been filed against the judgment and decree of the learned Subordinate Judge, Tindivanam dated 10.09.2009 made in A.S.No.32/1995 on the

file of the Sub Court, Tindivanam. Palani, the first respondent in the second appeal filed the suit O.S.No.607/1989 on the file of the Court of District Munsif, Tindivanam for partition, separate possession and for mesne profits against 1) Thirumal, 2) Rasu and 3) Jayamoorthy (the first appellant in the second appeal) ranking them as defendants 1 to 3 respectively. The suit was dismissed with cost by the trial court by its judgment and decree dated 31.03.1995. As against the same, the plaintiff Palani (first respondent in the second appeal) filed A.S.No.32/1995 on the file of the Sub Court, Tindivanam. The learned Additional Subordinate Judge, Tindivanam by the impugned judgment and decree dated 10.09.2009 allowed the appeal, set aside the decree of the trial court dismissing the suit and granted a preliminary decree for partition holding that the plaintiff was entitled to 1/3 share in the suit properties and directing division of the suit property in to three equal shares and allotment of one such share to the plaintiff/first respondent in the second appeal. The learned Additional Subordinate Judge, Tindivanam relegated the decision regarding mesne profits to a separate enquiry to be conducted on an application to be filed for the said purpose.

2. During the pendency of the first appeal before the lower appellate court, Kaliasammal and Kalyani (the appellants 2 and 3 in the second appeal), one Alamelu and the respondents 2 to 7 in the appeal were impleaded as respondents 4 to 12 in the first appeal before the lower appellate court. Now the first appellant in the second appeal (3rd defendant) and the appellants 2 and 3 in the second appeal (respondents 4 and 5 in the first appeal) have filed the present second appeal challenging the decree of the lower appellate court dated 10.09.2009 made in the above said appeal suit A.S.No.32 of 1995.

3. Palani, the first respondent herein filed the suit making the following averments in the plaint: The properties described in the plaint schedule are the properties of Hindu Mitakshara coparcenary consisting of the plaintiff Palani, first defendant Thirumal and the second defendant Rasu. Thirumal had got two wives and the second defendant Rasu is his son born through the first wife, whereas the plaintiff is his son born through his junior wife. The third defendant Jayamoorthy (the first appellant in the second appeal) is the son of the second defendant Rasu. The plaintiff and defendants 1 and 2 being the coparceners of the Hindu Mitakshara

undivided family, the plaintiff is entitled to 1/3 share in the suit properties as a coparcener. Taking advantage of the fact that the plaintiff is a junior member of the family, the defendants 1 and 2 attempted to encumber the suit properties and the plaintiff asked them not to do so. Disregarding the said request of the plaintiff, the defendants 1 to 3 chose to get patta in their names. Such an issue of patta in the names of defendants 1 to 3 shall not defeat the rights of the plaintiff in respect of the suit property. While so, it was brought to the notice of the plaintiff in the month of June 1989 that the defendants 1 to 3 had changed the patta regarding the suit properties in their names suppressing the fact that the plaintiff has got a right to share in them. Such a patta obtained by them shall not defeat the rights of the plaintiff. However the suit properties are in the joint possession of the plaintiff and defendants 1 to 3. In view of the hostile attitude of the defendants in getting patta for the suit properties in the name of the third defendant Jayamoorthy (first appellant in the second appeal) as a result of collusion among the defendants 1 to 3, it became no longer feasible to continue the joint possession and enjoyment and hence the plaintiff has been driven to file a suit for the relief of partition, separate possession and mesne profits.

4. Thirumal, the first defendant remained *exparte* and he did not file any written statement. The second defendant Rasu and his son Jayamoorthy (3rd defendant/first appellant in the second appeal) filed separate written statements containing similar averments and contested the suit. The averments made in their written statements in brief are as follows: i) The claim of the plaintiff that he and the defendants 1 and 2 constituted a Hindu Undivided Family governed by Mitakshara law and all the three jointly enjoyed the family properties is false. There was no marriage between the first defendant Thirumal and the mother of the plaintiff. Plaintiff must prove his claim that he is a legal heir of the first defendant. The mother of the plaintiff had been married to one Ramadoss Naicker of Perumalsery of Madurantakam Taluk. After the death of Ramadoss Naicker, the plaintiff's mother came to her mother's village Konjiamangalam and settled there permanently in the house of her mother. 20 years prior to the filing of the suit, the first and second defendants effected an oral partition of their family properties and thereafter they were enjoying the respective shares allotted to them in such oral partition. The second defendant along with his son, namely the third defendant, is

in possession and enjoyment of the properties, which he got towards his share in the family property under the above said partition. Even if the plaintiff has got any right, such a right shall be entitled to claim a share in the properties in the enjoyment of the first defendant. ii) In addition to the oral partition, pursuant to a decision made in a Panchayat, the first defendant executed a Release Deed in favour of the second defendant in respect of the suit properties and the plaintiff has also signed in the Release Deed. After the filing of the present suit for partition, the first defendant Thirumal sold some of the items of the suit properties viz. 4 = cents out of 0.07.5 hectares comprised in S.No.535/1 called Killiyanur ellai punjai along with the borewell and motor pumpset to one Kaliyamoorthy, son of Boopal Naicker. 0.40 acres out of 4.51 acres comprised in S.No.39/2 and 38/1 was also sold by the first defendant to the above said Kaliyamoorthy. The failure to include the said properties sold by the first defendant to Kaliyamoorthy and the failure to implead the purchaser, have made the suit as one bad for non-joinder of necessary parties. In addition, 5 cents of nursery comprised in S.No.24/6, 15 cents comprised on S.No.534/14 (and 17/2) and 0.01.0 hectare comprised in S.No.534/1 (31/1A) along with 12 coconut trees standing thereon have been encroached upon by one Boopal Naicker. The said property also belongs to the family of the first defendant Thirumal. As the above said Boopal Naicker is not made a party to the suit, the suit is liable to be dismissed as not maintainable.

5. Based on the above said pleadings, seven issues and two additional issues were framed and based on the same a trial was conducted, in which one witness was examined as PW.1 and six documents were marked as Exs.A1 to A6 on the side of the plaintiff, whereas four witness were examined as DWs.1 to 4 and 36 documents were marked as Exs.B1 to B36 on the side of the defendants. The learned Additional District Munsif, Tindivanam, at the conclusion of trial, considered the evidence and dismissed the suit without cost by judgment and decree dated 31.03.1995.

6. On appeal, the learned lower appellate judge, namely the Additional Subordinate Judge, Tindivanam reversed the said judgment of the trial court, set aside the decree passed by the trial court and granted a preliminary decree in favour of the plaintiff holding him entitled to 1/3 share in the suit property as

coparcener and directing division of the suit properties into three equal shares and allotment of one such share to the plaintiff by its judgment and decree dated 10.09.2009 made in A.S.No.32/1995 on the file of the Sub-Court, Tindivanam. The learned lower appellate judge relegated the question of mesne profits to be decided in a separate enquiry to be conducted on an application to be filed for the said purpose. Questioning the correctness of the above said judgment and decree of the lower appellate court and challenging the same, the present second appeal has been filed on various grounds set out in the grounds of second appeal.

7. Out of the 12 persons, who figured as respondents 1 to 12 before the lower appellate court, Thirumal (1st defendant/first respondent in the appeal) died during the pendency of the appeal before the lower appellate court and the appellants 2 and 3 in the second appeal and respondents 2 to 7 in the second appeal had been impleaded as parties in the appeal before the lower appellate court. Subsequently, the second defendant Rasu also died. All his legal representatives were already on record. Therefore, the second appeal has been preferred by the third respondent (first appellant) and appellants 2 and 3 (respondents 4 and 5 in the lower appellate court). The respondents 6 to 12 in the first appeal have been arrayed as respondents 2 to 7 in the second appeal. The plaintiff Palani, who was the sole appellant before the lower appellate court figures as the first respondent in the second appeal.

8. This court heard the arguments of Mr.Sathish Rajan, learned counsel for the appellants and by Ms.Usha Raman, learned counsel for the respondents. The materials available on record were also perused.

9. At the time of admission of the second appeal, the following questions were identified and formulated as the substantial questions of law. 1) Whether the first appellate court failed to follow the procedure of law in marking documents Viz.Ex.A8 to A12 filed as additional evidence before the first appellate court at a belated stage?.

2. Whether the finding arrived by the first appellate court is correct while reversing the judgment and decree of the trial court on the basis of the additional documents filed without giving opportunity to the appellant and without proving the documents

by way of oral evidence and in the manner known to law?.

10. In the appeal before the lower appellate court, the plaintiff, who was the appellant before the lower appellate court, filed an application in I.A.No.89/2009 under Order XLI Rule 27 CPC seeking permission to adduce additional documentary evidence and produced five documents to be marked as additional evidence. The learned first appellate judge, without even showing the said application in the cause title as the one disposed of along with the appeal, chose to simply incorporate a paragraph in the judgment allowing the said application and marking those documents produced along with the application as Ex.A8 to A12 without following the procedure contemplated for taking additional evidence in the appellate stage. For the sake of convenience, the said paragraph, which alone deals with the application under Order XLI Rule 27 is reproduced. ".At the appellate stage, appellant/plaintiff counsel had filed petition under Order 41 Rule 27 CPC to mark the 4 documents in order to prove that the plaintiff mother and Thirumal naicker lived as husband and wife and plaintiff is the son born to Thirumalnaicker & Porkilai ammal who is the plaintiff mother. On going through these document, it is found that is is relevant and admissible document and however it is exhibited only before appellate court the above said 4 documents be rejected that it is filed belatedly. In the interest of justice and on exceptional ground this court allows allows IA.89/09 and the documents Exs.A8 to A12 are allowed to be marked on the appellate side.". It is pointed out that the above said passage from the judgment of the lower appellate court has been exactly reproduced with all mistakes found therein.

11. Order XLI Rule 27 enumerates the circumstances under which a party can be permitted to lead additional evidence in the appellate stage. Either the document should have been produced before the trial court and improperly rejected by the trial court or the parties seeking permission to adduce additional evidence should prove that despite due diligence, such party did not have the knowledge of the existence of such evidence or that despite due diligence, the party was not able to produce the evidence before the trial court. Apart from the above said two grounds, the third ground is that the appellate court should be convinced that the production of the additional evidence is necessary for rendering a proper and

complete justice. The party seeking permission to adduce additional evidence should fit his case in any one of the above said three grounds. If the party seeking permission to adduce additional evidence is not in a position to bring his case within the ambit of Rule 27, then the permission for adducing additional evidence cannot be granted. For better appreciation, Order 41 Rule 27 is reproduced here under. ".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 notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise if due diligence, be produced by him at the time when the decree appealed against was passed, or) (b) the Appellate Court may 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. (2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

12. In this case, as rightly contended by the learned counsel for the appellants in the second appeal, there is no discussion as to the reasons for the failure to produce the documents before the trial court itself and there is also absence of a clear finding that the production of the said document was absolutely necessary in the interest of justice for rendering a proper and complete justice. Which one of the above said clauses of Rule 27 was relied on by the learned lower appellate judge for allowing the said application and permitting the appellant therein (plaintiff/first respondent in the second appeal) to adduce additional evidence, has not been indicated by the lower appellate judge. The learned lower appellate judge has also not discussed the averments made in the affidavit filed in support of the application and the averments made in the counter affidavit of the opposite party. The order of the lower appellate judge incorporated in the said judgment allowing the said application is a crippled one devoid of necessary discussions.

13. In addition, as rightly contended by the learned counsel for the appellants, though an application under Order XLI Rule 27 is to be heard along with the appeal, an order dismissing the application can be incorporated in the judgment itself, when the appellate court decides to dismiss the application. The procedure to be followed in case the appellate court decides to allow such applications shall be different. In such cases, the appellate court has to follow the procedure for taking evidence in the appellate stage. Order XLI Rule 28 deals with the same. The same reads as follows: "

28. Mode of taking additional evidence. - 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 subordinate Court, to take such evidence and to send it when taken to the Appellate Court."

14. There shall be only one circumstance under which the appellate court can mark the documents and proceed with the pronouncement of judgment i.e. in case the parties do not raise objection and they do give their consent for marking the documents produced as additional evidence. In such an event there shall be no necessity to postpone the further hearing of the appeal and the appellate court can record the same in the order passed in the application under Order 41 Rule 27 and mark those documents by consent as additional evidence, hear further arguments in the appeal in the light of such additional evidence and then proceed with the pronouncement of the judgment in the appeal.

15. As per the above said rule, the additional evidence can be taken either by the appellate court itself or the appellate court can direct the lower court from which appeal has come or any other court subordinate to it to take evidence and transmit the same to the appellate court for being considered in the appeal. In either case, the appellate court has to indicate in its order allowing the application under Order XLI Rule 27, the points on which the additional evidence is to be adduced. A reading of the paragraph extracted from the judgment of the lower appellate court will show that the learned lower appellate judge, either in ignorance of the said provision or in utter disregard for the same, has omitted to follow the procedure. Therefore, this court does have no hesitation in coming to the conclusion that the

learned lower appellate judge has committed an error in not following the procedure contemplated under Order 41 Rule 27 and Rule 28 CPC in dealing with an application seeking permission to adduce additional evidence in the appellate stage. This court also holds that the learned lower appellate judge has committed a grave error in law in simply marking the documents produced by the first respondent herein (appellant before the lower appellate court) giving them exhibit numbers and referring them in the judgment of the lower appellate court. It is obvious that the admissibility, genuineness and reliability of the documents produced along with the application filed under Order 41 Rule 27 were challenged by the opposite parties. That being so, the learned lower appellate judge should not have chosen to simply mark the documents as exhibits on the side of the plaintiff and proceed with the disposal of the appeal. The procedure for taking additional evidence in the appellate stage has not been followed. Hence this court answers both the substantial questions of law in favour of the appellants.

16. In addition, it is also pointed out that the passage dealing with the application under Order 41 Rule 27 in the judgment of the lower appellate court, which has been extracted supra states that four documents were produced along with the application, but in the very same paragraph five documents seem to have been marked as Exs.A8 to A12. The same also shows sheer non-application of mind and mechanical allowing of the petition and marking of those documents as exhibits on the side of the plaintiff in the appellate stage.

17. In view of the answers given to the substantial questions of law, this court comes to the conclusion that the second appeal is bound to be allowed. The judgment and decree of the lower appellate court are liable to be set aside and the appeal should be remitted back to the lower appellate court with a direction to pronounce a separate order in I.A.No.89/2009, if the lower appellate court is of the opinion that the same should be allowed and then follow the procedure contemplated under Rule 28 of Order 41 for taking additional evidence and thereafter proceed with the further hearing of the appeal and decide the appeal afresh. In the result, the second appeal is allowed. The judgment and decree of the lower appellate court dated 10.09.2009 made in A.S.No.32 of 1995 are set aside. A.S.No.32 of 1995 is remitted back to the lower appellate court (Additional

Subordinate Judge, Tindivanam) with the following directions: i) The lower appellate court shall hear the application I.A.No.89/2009 along with the appeal and in case it decides to allow the said application, a separate order should be passed and thereafter recording of additional evidence should be made following the procedure contemplated under Order 41 Rule 28 CPC. ii) After such recording of additional evidence, further arguments in the appeal should be heard and then a judgment should be pronounced. iii) While doing so, the lower appellate judge shall not be influenced by any of the observations made on merit in the judgment of the lower appellate court, which is hereby set aside. There shall be no order as to costs in the second appeal. asr To 1. The Additional Subordinate Judge, Tindivanam 2. The Additional District Munsiff Tindivanam

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