

Petitioner Vs. Respondents

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SooperKanoon Citation : sooperkanoon.com/1189026

Court : Chennai

Decided On : Aug-12-2016

Judge : M.M. Sundresh

Appeal No. : A. No. 4391 of 2015 & O.A. Nos. 445 & 446 of 2015 in C.S. No. 334 of 2015

Appellant : Petitioner

Respondent : Respondents

Judgement :

1. A.No.4391 of 2015 has been filed by the applicants/ defendants 1 to 17 seeking to reject the plaint in C.S.No.334 of 2015.

2. Heard Mr.R.Parthasarathy, learned counsel appearing for the applicants/defendants 1 to 17 and Mr.R.Thiagarajan, learned counsel appearing for respondents 1 to 7/plaintiffs.

3. For the sake of brevity, the plaintiffs and the defendants in C.S.No.334 of 2015 are arrayed as such.

4. Analysis of background facts are in need to understand the case.

4.1. The suit properties originally belonged to late Haji Mohamed Abdul Azeez, who died in the year 1945. He had two wives viz., late Fathima Bi(first wife) and

late Mahaboob Bi(second wife). Fathima Bi had a son and daughter by name late Abdul Khader and Ansar Bi, predeceased Fathima Bi. The respondents 1 to 7/plaintiffs are the legal heirs of late Abdul Khader.

4.2. Late Mahaboob Bi had two sons and three daughters. One daughter late Mariam Bi predeceased her. The defendants 1 to 17, who are applicants herein, are the legal heirs of the two sons viz., Late H.A.G.Dastagir Sheriff and late Mohamed Sheriff.

4.3. A deed of partition was entered into between Abdul Khader, who was the predecessor in title of the plaintiffs on the one hand and Mahaboob Bi and her children viz., two sons and two daughters on the other hand. This document has been registered as Document No.974/1945. The deed makes a mention that a dispute arose on the plaintiffs on an earlier oral Wasiath and thus, it was felt to have the said partition deed through the mediators. Both movable and immovable properties have been allotted to each group claiming through both the wives of the deceased Haji Mohamed Abdul Azeez.

4.4. The suit has been filed inter alia alleging that the partition deed dated 31.05.1945 is invalid in the eye of law. The following are the averments contained in para 20 of the plaint:

20. The plaintiffs state that the partition deed effected on 31.05.1945 is not legal since it is not in consonance with the Sariath Law and hence, this partition deed is invalid in the eyes of law, the reasons being (1) the oral Wasiath is not valid since it is not executed in the present of two male witnesses (2)The entire property was invalidly and illegally and fraudulently distributed and taken away between the second wife's children (3) There was major undervaluation in the assessment of the properties and this was purely done in order to benefit the children of the second wife of the deceased (4) The aggregate of the shares is 1 and 1/8th instead of 1, meaning fraudulent distribution.

Thus, the said partition referred to above is questioned on very many grounds. It is apposite to refer para 16 of the plaint.

The plaintiffs are questioning the partition deed dated 31.05.1945 registered as document No.974 of 1945 in the office of the Sub Registrar, Periamet, Chennai. Thus, the division of the properties effected under the partition deed is not valid in the eyes of law.

4.5. As per the plaint, the second wife of late Haji Mohamed Abdul Azeez executed a registered settlement deed on 19.05.1949 in favour of her two sons, which was followed by a partition deed dated 16.02.1970 registered as document No.261/70. It is also alleged that the earlier oral Wasiath was done under the influence of late Mahaboob Bi being the second wife of the deceased.

4.6. The father of the first plaintiff viz., Abdul Khader, who was the signatory to the partition deed dated 31.05.1945 died in the year 1971. More than 60 years after the said deed the defendants entered into a joint venture agreement on 15.11.2012 with the developer over the property which is also the subject matter of the deed of partition dated 31.05.1945.

4.7. Now, at this juncture, the present suit has been filed claiming the cause of action from the year 1945 onwards till the exchange of notices in the year 2014. According to the plaintiffs, in all these years, they were hoping for an amicable settlement. Thus, the suit has been laid for the following relief:

(a) Directing division of the plaint schedule properties into three shares by metes and bounds with reference to good and bad soil and allotting of 1/3rd share to the plaintiffs 1 to 7 herein jointly and put the same in plaintiffs possession,

(b) Granting permanent injunction, restraining the defendants, or any one claiming through them or authorized by them in any manner intermeddling or encumbering or alienating or creating any mortgage, lease, charge or joint development in respect of the plaint schedule properties till the final partition takes,

(c) For appointment of an advocate commissioner to effect division of the plaint suit properties in the aforesaid manner,

(d) for such further or other reliefs and

(e) for costs of the suit.

5. Submissions of the Plaintiffs:-

The learned counsel appearing for the plaintiffs submits that cause of action is available as per the averments made in the plaint. The plaint has to be read on a whole and the issues are to be decided only at the time of disposal of the suit. Even a frivolous suit can be maintained. There is no necessity to challenge the registered partition deed dated 31.05.1945. As disputed question of facts are involved, the application filed has to be rejected. In support of his contention, reliance has been made on the following decisions.

1. KOLLI VENKATA MOHAN RAO AND ANOTHER Vs. J.M.PATRICIA AND OTHERS ((2015) 2 CTC 67);
2. SURJIT KAUR GILL AND ANOTHER VS. ADARSH KAUR GILL AND ANOTHER ((2014) 16 Supreme Court Cases 125); and
3. JOHN KENNEDY AND ANOTHER VS. RANJANA AND OTHERS ((2014) 15 Supreme Court Cases 785).

6. Submissions of the Defendants:-

The learned counsel appearing for the defendants 1 to 17 submits that the suit is not maintainable for not having a prayer for declaration instead of a mere partition and separate possession. Even otherwise, such a suit is barred by limitation as the document was executed on 31.05.1945. The plaint averments also show that subsequent developments have occurred. There is no cause of action available in the suit. The suit is liable to be dismissed for partial partition. The plaintiffs have sold the properties allotted under the deed of partition. Thus, both the parties have acted upon the deed of partition. The question of limitation being one of law can be a factor for considering the application under Order VII Rule 11 of the Code of Civil Procedure, 1908. To buttress his submissions, the following decisions are relied upon.

1. ANATHULA SUDHAKAR VS. P. BUCHI REDDY (DEAD) BY LRS. AND OTHERS ((2008) 4 Supreme Court Cases 594);

2. VASUMATHI H. SHAH VS. PUSHPA RAJU (2015 (3) CTC 54);

3. Order passed by this Court in O.S.A.No.191 of 2015 dated 22.09.2015 (Mrs. PUSHPA RAJU Vs. Mrs. VASUMATHI H. SHAH);

4. T. ARIVANDANDAM VS. T.V. SATYAPAL ((1977) 4 Supreme Court Cases 467);
and

SOPAN SUKHDEO SABLE AND OTHERS V. ASSISTANT CHARITY COMMISSIONER AND OTHERS ((2004) 3 Supreme Court Cases 137).

7. The narration of facts are not disputed, particularly, with reference to the execution of the documents and their contents. The suit is filed only for partition and separate possession. The averments as referred supra would clearly show that challenge is made only to the deed of partition dated 31.05.1945. Such a challenge without a prayer for declaration cannot be maintained. The fact that the deed has been signed by the ancestors of the plaintiffs is not in dispute. The plaintiffs are only claiming under the Mohammedan Law and thus, they do not have an independent right, though being the children of the deceased Abdul Khader. The plaintiffs want to raise the issues, which have become stale. This Court is of the view that in all fairness, the plaintiffs ought to have filed a suit for declaration especially when the very entitlement itself is being questioned in the teeth of an undisputed registered document. Thus, applying the ratio laid down by the Apex Court in ANATHULA SUDHAKAR VS. P. BUCHI REDDY (DEAD) BY LRS. AND OTHERS ((2008) 4 Supreme Court Cases 594), this Court is of the considered view that the suit as filed is not maintainable especially a serious cloud has been raised over title.

8. Even assuming that the suit is maintainable, the next question which would come up for consideration is that of limitation. An issue pertaining to a limitation can either be a mixed question of fact and law or pure law. It depends upon the facts and circumstances of the case. Therefore, this Court is not inclined to go into

various judgments relied upon by both sides.

9. In the case on hand, the execution of the registered partition deed dated 31.05.1945 is not in dispute. The document itself says the circumstances under which it was executed giving reasons for the non acceptance of the oral Wasiath. Therefore, the oral Wasiath has got no relevancy. It is curious to note that even during the life time of late Abdul Khader being a party to the said deed, there was no challenge. On the contrary, the properties allotted to him were dealt with as that of his own and disposed of. The plaint also proceeds to state that the predecessor of the defendants has executed a settlement deed in the year 1945 followed by another one in 1970, which were registered. A mere fact that the defendants have entered into a joint venture with the third party cannot be a ground for cause of action, not being a material fact. Thus, as the suit is hopelessly barred by limitation, this Court is of the considered view that there is no mixed question of fact and law involved in the case on hand.

10. Coming to the prayer sought for in the plaint, obviously the plaintiffs do not want to pay the heavy Court fee, which might arise in the event of a prayer for declaration. There is no explanation for seeking partition only for the schedule mentioned property in the plaint leaving others. Therefore, the suit is also hit by the doctrine of partial partition though the same cannot be a sole ground for rejection.

11. The scope of Order VII Rule 11 of Code of Civil Procedure is well known. The Court has to see the plaint averments as a whole. No other contra material is required to be seen at that stage. The exercise of the power depends upon facts and circumstances of the case. When on facts if it is found that there is no cause of action, apart from hit by limitation, then the Court has to exercise its power under Order VII Rule 11 of Code of Civil Procedure instead of driving the parties to go through the rigour of trial. Accordingly, the Application No.4391 of 2015 stands allowed.

12. In view of the order passed by this Court in A.No.4391 of 2015 in C.S.No.334 of 2015, the suit in C.S.No.334 of 2015 stands dismissed. Consequently, O.A.Nos.445 and 446 of 2015 are closed.

