

Antony Vs. Udayar and Others

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Court : Chennai Madurai

Decided On : Apr-28-2016

Judge : R. Mahadevan

Appeal No. : S.A.(MD)No. 812 of 2005 & C.M.P.(MD).No. 5238 of 2005 & M.P.(MD)No. 1 of 2012

Appellant : Antony

Respondent : Udayar and Others

Judgement :

(Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree passed in A.S.No.36 of 2004, dated 29.04.2005 on the file of learned Additional Subordinate Judge, Tenkasi, reversing the judgment and decree passed in O.S.No.67 of 2001, dated 08.03.2004 on the file of learned Principal District Munsif, Tenkasi.)

1. This appeal is directed against the judgment and decree dated 29.04.2005, made in A.S.No.36 of 2004 on the file of learned Additional Subordinate Judge, Tenkasi, reversing the Judgment and Decree dated 08.03.2004, made in O.S.No.67 of 2001, on the file of the learned Principal District Munsif, Tenkasi.

2. For the sake of convenience, the parties are referred to in this judgment in accordance with their respective ranks in the suit. At appropriate places, the ranks of the parties in the appeal are also shown to achieve clarity.

3. The factual matrix relevant for deciding the second appeal is as below:-

3.1. The suit first item of property along with other properties originally belonged to one Subban by way of 'Thotti Maniam'. He died leaving behind him his three sons, namely, Arumugam, Pandaram and Govindan, as his legal heirs. They were in joint possession of the properties. On 15.12.1964, a partition was effected between them in the presence of Panchayatdars. By virtue of the same, the first item of property and some other properties were allotted to Manickam. The said Manickam died on 15.11.1992 leaving behind him his five sons and a daughter as his legal heirs. The first item of property was allotted to the plaintiff as per family arrangement. Pandaram died without issues. The defendants 1 to 4 are the legal heirs of Arumugam and they do not have any right over the first item of property at any point of time including possession. Thus, the plaintiff is in possession and enjoyment of the suit properties by making payment of tax for a long time.

3.2. While so, on 25.09.1999, defendants 1 to 4, claiming themselves that the suit properties belong to them, attempted to sell away the suit properties to third parties. Defendants 5 to 7, claiming that they have purchased the suit properties from defendants 1 to 4, cut neem trees standing on the first item of the first schedule property. The defendant No.8 had been permitted to construct a house in an extent of 3 cents in the first schedule property with the help of defendants 5 to 7. The house constructed area is the second schedule property. The remaining portion under the possession of the plaintiff is the third schedule property. The second and third schedule properties are part and parcel of the first schedule property. Therefore, the plaintiff filed a suit for a declaration declaring that the first schedule property belongs to the plaintiff and consequently, for permanent injunction in respect of the third schedule of property and also for recovery of possession and mandatory injunction in respect of the second schedule of property.

3.3. The second and third defendants filed their written statement stating that it is false to state that Govindan died without any legal heir. Defendants 1 to 4 are only the legal heirs of Govindan. Family arrangement dated 15.12.1964, as stated in the plaint, is a false one. There is no necessity for Arumugam and Pandaram to

have partition along with Manickam. Thus, the plaintiff has no right over the property in the first schedule, as per the family arrangement dated 15.12.1964 and the thumb impression of Arumugam is not that of him. The document was created for the purpose of vitiating the claim of the defendants. The suit is also not maintainable for non-joinder of necessary parties as the brothers of plaintiff were not added as parties. Defendants 1 to 4 are the legal heirs of the deceased Arumugam and since Govindan and Pandaram died without issues, the suit schedule properties belong to the defendants only and from them, the eighth defendant got the property by sale and constructed a house and hence, the suit, as filed by the plaintiff, is not maintainable.

3.4. During trial, on the side of the appellant/plaintiff, he himself was examined as P.W.1 and as many as 13 documents were marked as EX-A-1 to EX-A-13. On the side of the respondents/defendants, one Subbiah was examined as D.W.1 and as many as 12 documents were marked as EX-B-1 to EX-B-12.

3.5. Having considered all the above, the Trial Court framed necessary issues and answered the issues in favour of the plaintiff and decreed the suit as prayed for.

4. The matter was taken up in first appeal by the second and third defendants and the lower appellate Court considered the issues by framing the point for determination and answered all the issues against the plaintiff, thereby, dismissing the suit by reversing the judgment and decree of the trial Court. Aggrieved over the same, the appellant, who is the plaintiff, is before this Court with the present Second Appeal.

5. When the Second Appeal was admitted, on 21.06.2006, this Court framed the following substantial questions of law:-

"(a) Whether 1st appellate court is correct in reversing the finding of the trial Court with reference to Ex.A.1 merely on the basis that it is unregistered? and

(b) Whether the 1st appellate Court's finding is correct when the court can consider the unregistered document for collateral purposes to prove the possession of the appellant?"

6. However, subsequently, when the appeal came up for hearing on 09.07.2012, this Court framed the following additional substantial questions of law for consideration:

"(a) Whether the findings of the trial Court is vitiated for not considering Ex.A.1 in the light of other oral and documentary evidence adduced on both sides? and

(b) Whether the manner of disposal of the appeal by the lower appellate Court is in accordance with the procedure laid down under relevant rules or Order 41 of the Code of Civil Procedure and the legal principles laid down by the Hon'ble Apex Court?"

7. I have heard the learned counsel appearing for the appellant, the learned Counsel appearing for the respondents 3, 9 to 13 and I have also gone through the materials available on record carefully, including the Judgments rendered by the Courts below.

8. The learned counsel appearing for the appellant submitted that the plaint schedule properties are described as schedule I to III. The first schedule property is the entire property, in which, the eighth defendant encroached an extent of 3 cents of land and constructed a house, which was mentioned as the second schedule property and except the encroached land, the remaining portion was mentioned as third schedule property. It is an admitted fact that the entire suit properties originally belonged to one Subban by way of 'Thotti Maniam' and he had three sons, viz., Arumugam, Pandaram and Govindan, out of which, Pandaram died without issues. The defendants 1 to 4 are the legal heirs of Arumugam. Govindan, the son of Subban, has son by name Manickam and the plaintiff is the son of the said Manickam. After the death of Subban, his sons were in joint possession and enjoyment of the first suit schedule properties including other properties. After the death of Govindan, a partition was effected between Arumugam, Pandaram and Manickam, S/o.Govindan, on 15.12.1964. Ex.A.1 is the partition deed, which clearly proves the possession and enjoyment of the first schedule property by the father of the plaintiff. The plaintiff has produced the death certificate of Manickam, which was marked as Ex.A.10, which shows that Govindan is the father of Manickam.

9. Adding further, the learned counsel submitted that Ex.A.1 was executed in the year 1964 and it is an ancient document and the defendants also were not in a position to prove that it is a false one. It is also to be noted from Exs.A.4, 9, 11, 12 and 13 that Govindan is the father of Manickam and thus, Ex.A.1 partition deed is not a fraudulent one, as alleged by the defendants. There is some corroboration in the evidence of D.W.1 and in his cross-examination, he also admitted that Govindan married one Pooli and out of their wedlock, they blessed with the child named Manickam. Therefore, from the oral and documentary evidences, it is evident that the first schedule property absolutely belongs to the plaintiff as he is the son of Manickam and he is in possession and enjoyment of the third schedule property and the eight defendant constructed a house in the second schedule property, which is a part of the first schedule property, which fact was rightly considered by the Trial Court. Coming to the contention regarding non-joinder of necessary parties, the same is also not acceptable, when the defendants were not in a position to say about as to who are the necessary parties and they were omitted to be included. Therefore, viewed from any angle, the appellant has proved his case and the Trial Court has also rightly dealt with the issue, but the first appellate Court, without considering the oral and documentary evidences adduced on behalf of the appellant, wrongly arrived at a decision and dismissed the suit, which needs interference at the hands of this Court.

10. The learned counsel for the respondents 3, 9 to 13 submitted that the Trial Court has lost sight of the legality and evidence available on record in decreeing the suit without giving weightage to the evidence available on record and the first appellate Court has correctly considered the said aspect. As alleged in the plaint, Manickam, the father of the plaintiff, is not the son of Govindan and Ex.A.1 is not a valid document in the eye of law and it is only a make believe document created for the purpose of the suit. Ex.A.1 is not admissible in evidence, since it was executed without the knowledge of Arumugam and Pandaram. It is also to be noted that Ex.A.1 is an unregistered and unstamped document without mentioning survey number or extent. When Ex.A.1 itself is not a genuine one and not a bona fide document, there cannot be any possession and enjoyment by virtue of the said document and when that being so, the plaintiff is not entitled to any of the reliefs as sought for in the plaint. As per Ex.B.1, the properties involved in the suit

were owned and dealt with by Arumugam and Pandaram alone and not by Govindan. He also submitted that the Trial Court failed to note that the suit properties were in possession and enjoyment of the second and third defendants, as per the evidence of plaintiff. Therefore, the first appellate Court, relying on the evidence adduced on the side of the defendants, correctly came to the conclusion and allowed the appeal by reversing the judgment of the Trial Court and the same does not warrant any interference at the hands of this Court.

11. I have considered the above rival submissions.

12. Admittedly, the plaint schedule properties are described as schedule I to III. The first schedule property is the entire property, in which, the eighth defendant encroached an extent of 3 cents of land and constructed a house, which was mentioned as the second schedule property and except the encroached portion, the remaining portion was mentioned as third schedule property. It is an admitted fact that the entire suit properties originally belonged to one Subban by way of 'Thotti Maniam'. He died leaving behind him his three sons, namely Arumugam, Pandaram and Govindan, as his legal heirs and they were in joint possession and enjoyment of the properties. It is also admitted that Pandaram died without issues. The defendants 1 to 4 are the legal heirs of Arumugam. The defendants 5 to 7 purchased the suit properties from the defendants 1 to 4 and the defendant No.8 had been permitted to construct a house in an extent of 3 cents in the first schedule property. The house constructed area is the second schedule property. The remaining portion under the possession of the plaintiff is the third schedule property. The second and third schedule properties are part and parcel of the first schedule property.

13. On consideration of the arguments advanced on either side and also on perusal of the documents available on record, it is seen that the whole case rests on Ex.A.1-partition deed. The Trial Court relying on Ex.A.1-partition deed, decreed the suit in favour of the plaintiff. However, on appeal, the first appellate Court, having found that Ex.A.1, being an unregistered and unstamped document, cannot be relied upon to decide the issue, allowed the appeal, by reversing the judgment and decree of the Trial Court.

14. Therefore, whether Ex.A.1-partition deed dated 15.12.1964 is admissible or inadmissible in evidence is a question of fact that has to be decided in this case.

15. As rightly contended by the defendants, Ex.A.1- is an unregistered and unstamped document. There is no dispute about it. However, a perusal of Ex.A-1 partition deed shows that it was a mere record of understanding reached between the parties earlier and it can only be stated to be a record of an agreement reached between the parties after negotiations. Therefore, it does not require any registration, as rightly contended by the learned counsel for the appellant. Even though the said document is an unregistered and unstamped one, as contended by the learned counsel for the contesting respondents, I am of the view that it was executed in the year 1964 and it cannot be simply rejected on the said ground alone.

16. To that ratio, it is useful to refer to the judgment of this Court reported in 1998(2) LW 678 [Ayyakkannu Padayachi and 3 others v. Boorasamy and another], wherein, at paragraph No.8, it was held thus:

" 8....A Division Bench of this Court reported in AIR 1974 Madras page 239=87 L.W.215 (C.S.Kumaraswamy Gounder v. Aragagiri Gounder and another), dealing with the question as to whether a document of partition would require registration or not and whether a document can be received in evidence for proving collateral purpose or not, has formulated three stages for an express completed partition which are as follows:-

" 1. the stage of effecting a division in status;

2. the stage of dividing the properties by metes and bounds; and

3. the stage of parties taking possession of the properties allotted to them.

After analysing the various issues that would arise for consideration, the learned Judges concluded that everyone of the three stages can be effected orally and no document was necessary and that in respect of stages 1 and 3 even if there was a document, it did not require registration as the said stage cannot be said to declare, assign, limit or extinguish any right, title or , interest. The Bench

proceeded further and held that it is only with regard to the second stage, namely, actual division of properties in different shares and allotment thereof to the various members, if the same is reduced to writing, it required registration under Section 17(1)(b) of the Act. Therefore, having regard, to the nature of Ex.B-1, I am inclined to hold that Ex.B-1 was only a record of an understanding reached between the parties after the panchayat."

17. In view of the above settled position of law, this Court is of the view that the first appellate Court, without looking into the veracity of Ex.A.1, allowed the appeal filed by the defendants, holding that Ex.A.1, a document, which is not having any legal sanctity, cannot be taken as a piece of evidence for deciding the issue, which needs to be interfered with at the hands of this Court. The first appellate Court also failed to consider Ex.A.1, in the light of the oral and documentary evidences adduced on either side.

18. Therefore, after going through the judgment of the Court below, this Court is of the view that the conclusion drawn by the first appellate Court is erroneous being contrary to the settled position of law and by ignoring material evidence. Since the first appellate Court did not consider the issue regarding the right of the appellant in the plaint schedule properties and proceeded on the basis that Ex.A.1 is an unregistered and unstamped document, the said issue is required to be looked into by the first appellate Court. Therefore, I am of the view that the matter has to be remitted back to the first appellate Court. Though Ex.A.1-partition deed was an unregistered and unstamped document, the first appellate Court shall consider the same, in the light of the oral and documentary evidences adduced on either side, as it was executed in the year 1964 between the parties, pursuant to the panchayat. Once the veracity and truthfulness of Ex.A.1 is decided, the issue could be resolved and hence, the first appellate Court shall decide the issue on merits and as per law without in any way being influenced by the observations as contained in this judgment.

19. In the result, the Second Appeal is allowed and the judgment and decree of the first appellate Court is set aside and the matter is remanded to the first appellate Court to decide the whole issue afresh with liberty to both sides to let in

additional evidence, if necessary. Since the suit is of the year 2001, it is needless to mention that the first appellate Court will give priority for disposal of this case and to see that the case is disposed of at the earliest point of time and in any case not later than, six months from the date of receipt of a copy of this judgment. No costs. Consequently, the connected miscellaneous petitions are closed.

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