

Narayanaswamy Vs. Raman

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Court : Chennai

Decided On : Feb-26-1999

Reported in : (1999)3MLJ721

Appellant : Narayanaswamy

Respondent : Raman

Judgement :

E. Padmanabhan, J.

1. The defendant in O.S. No. 1083 of 1981 on the file of the District Munsif Court, Perambalur, who had been unsuccessful before the two courts below is the appellant. This appeal has been directed against the judgment and decree of the learned Subordinate Judge, Ariyalur made in A.S. No. 112 of 1984 in confirming the judgment and decree of the District Munsif Court, Perambalur, dated 30.4.1983 made in O.S. No. 1083 of 1981.

2. At the time of admission, the following substantial question of law was framed by this Court.

Whether the construction placed by the courts below on Exs.B-2 and B-3 is correct?

3. Heard Mr. A. Subramaniya Iyer, for the appellant and Mr. S. Parthasarathy, for the respondent.
4. For convenience, the parties will be referred as arrayed before the trial court.
5. The plaintiff instituted the suit for declaration of title and for injunction. According to the plaintiff, the suit property and the adjacent land in all measuring 1 acre, 5 cents was the subject matter of purchase under Ex.A-2 dated 1.1.1966 by Angamuthu from Seetharamam Udayar. The said Angamuthu had in turn conveyed 35 cents under Ex.A-1, dated 11.8.1980. Based upon the said deed of purchase, the plaintiff had come forward seeking the relief of declaration of title and for consequential injunction alleging that the defendant is attempting to trespass.
6. The defendant pleaded that though the purchase under Ex.A-2 dated 1.1.1966 was effected by Angamuthu, it was for the benefit of Angamuthu and his brothers Kulandaivelu and Duraisamy, that Angamuthu had no separate right or interest over the suit property itself, that the sale deed Ex. A-1 dated 11.8.1980 is not binding on the defendant nor it will confer any title on the plaintiff, that the sale deed dated 11.8.1980 has been created with false claims, that the plaintiff had been instigated by Seetharama Udayar to file the suit, that Angamuthu, Duraisami and Kulandaivelu who are the brothers living at Malaysia had purchased properties in Tamil Nadu and subsequently effected oral partition among themselves during the year 1972, followed by the deed of partition on 28.4.1972, that as per the partition, the suit property belonged to Kulandaivelu that after the death of the said Kulanthaivelu, the defendant had purchased the suit property from his wife and his son on 22.6.1978 for valid consideration under Ex.B-2 that since the date of purchase, the defendant is in possession of the suit property, besides paying kist, that the suit property is being enjoyed by the defendant alone with the adjacent properties owned by him, that the plaintiff is not in possession and that the plaintiff is not entitled to any relief prayed for.
7. Before the trial court, the plaintiff marked Exs.A-1 to A-47, while the defendant marked Exs.B-1 to B-11. A Commissioner was appointed, whose report and plan were marked as Exs.C-1 and C-2. The plaintiff had examined himself, besides one

Sadasivam as P.W.2 while the defendant examined himself besides three other witness. The trial court decreed the suit. On appeal by the defendant, the first appellate court had confirmed the judgment and decree of the trial court. Being aggrieved, the present Second Appeal has been preferred.

8. Mr. A. Subramaniya Aiyar, the learned Counsel for the appellant challenged the findings of the two courts below as contrary to the oral and documentary evidence adduced before the two courts below, besides being perverse, The counsel for the appellant further contended that the very documents produced by the plaintiff would show that Angamuthu was not entitled to the suit property, but it is Kulandaivelu, who is entitled to the suit property from where heirs, the defendant had purchased.

9. Per contra, Mr. S. Parthasarathy, the learned Counsel for the respondent contended that no interference is called for in the Second Appeal as it is a concurrent findings of fact. The learned Counsel for the respondent relied upon the decision of the Apex Court in Ramanuja Naidu v. Kanniah Naidu A.I.R. 1996 S.C. 3521 and Navaneethammal v. Arjuna Chetty A.I.R. 1996 S.C. 3521, in support of his contention that the second appellate court shall not interfere in a Second Appeal when the findings of the two courts below are concurrent.

10. In Navaneethammal v. Arjuna Chetty A.I.R. 1996 S.C. 3521, their Lordships of the Apex Court held thus:

this Court, time without number, pointed out that interference with the concurrent findings of the courts below by the High Court under Section 100, C.P.C. must be avoided unless warranted by compelling reasons. In any case, the court is not expected to reappreciate the evidence just to replace the findings of the lower courts.

11. In Ramanuja Naidu v. Kanniah Naidu : [1996]3SCR239 , the Apex Court held thus:

The true legal position in regard to the powers of the second appellate court under Section 100 was once more examined and it was pointed out that the learned

Judge of the High Courts should bear in mind the caution and warning pronounced by the Privy Council in the case of *Ms. Durga Chowdhrain* and should not interfere with findings of fact.

It appears that the decision of this Court in *Deity Pattathiramswamy* A.I.R. 1959 S.C. 57 was in fact cited before the learned single Judge, but he was inclined to take the view that some aspects of the provisions contained in Section 100 of the Code had not been duly considered by this Court and so, he thought that it was open to him to interfere with the conclusions of the courts below in the present appeal. According to the learned Judge, it is open to the second appellate court to interfere with the conclusions of the fact recorded by the District Judge not only where the said conclusions are based on no evidence, but also where the said conclusions are based on evidence which the High Court considers insufficient to support them. In other words, the learned Judge seems to think that the adequacy or sufficiency of fact is a matter of law which can be effectively raised in a Second Appeal. In our opinion, this is clearly a misconception of the true legal position. The admissibility of evidence is no doubt a point of law, but once it is shown that the evidence on which courts of fact have acted was admissible and relevant, it is not open to a party feeling aggrieved by the findings recorded by the courts of fact to contend before the High Court in Second Appeal that the said evidence is not sufficient to justify the findings of fact in question. It has been always recognised that the sufficiency or adequacy of evidence to support a finding of fact is a matter for decision of the court of facts and cannot be agitated in a Second Appeal. Sometimes, this position is expressed by saying that like all questions of fact, sufficiency or adequacy of evidence in support of a case is also left to the jury for its verdict. This position has always been accepted without dissent and it can be stated without any doubt that it enunciates what can be properly characterised as an elementary proposition. Therefore, whenever this Court is satisfied that in dealing with a Second Appeal, the High Court has, either, unwittingly and in a casual manner, or deliberately as in this case, contravened the limits prescribed by Section 100, it becomes the duty of this Court to intervene and give effect to the said provisions. It may be that in some cases, the High Court dealing with the Second Appeal is inclined to take the view that it regards to be justice or equity of the case has not been served by the findings of fact recorded by courts of fact; but

on such occasions it is necessary to remember that what is administered in courts is justice according to law and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in Second Appeals, the High Court contravene the express provisions of Section 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid..

We are of the view, that in interfering with the concurrent findings of facts of the lower courts, the learned single Judge of the High Court acted in excess of the jurisdiction vested in him under Section 100 of Civil Procedure Code. The learned Judge totally erred in his approach to the entire question, and in reappraising and reappreciating the entire evidence, and in considering the probabilities of the case, to hold that the judgments of the courts below are 'perverse' and that the plaintiff is entitled to the declaration of title to suit property and recovery of possession.

12. In the light of the above pronouncements, this Court has to consider the merits of the Second Appeal. Though the findings of the two courts below are concurrent, this Court is unable to sustain this judgment of the courts below as they have miserably failed to consider the material documents and oral evidence. The omission to consider the material documents and material portion of the evidence by the courts below is a valid ground for interference in the Second Appeal, even if it is against concurrent findings, merely because the findings are concurrent, this Court is not helpless as when it is demonstrated that the two courts below have failed to advert or consider the material portion of the evidence or their appreciation of evidence is perverse or the findings recorded by the two courts below are demonstrably incorrect on the face of the documentary evidence produced before the two courts below. This Court is considering this appeal being conscious of the pronouncement of the Apex Court as to the courts powers under Section 100, C.P.C.

13. It is to be pointed out that the defendant pleaded that there was a division between Angamuthu and his two brothers and it is true that no partition deed has

been produced by the defendant. But on that score, it would be highly improper to brush aside the other evidence available on record. Admittedly the suit properties originally belonged to one Seetharama Udayar from whom, Angamuthu had purchased under Ex.A-2 dated 1.1.1966. The plaintiff claimed that he had purchased the suit property from Angamuthu on 11.8.1980 under Ex.A-1, while the defendant claimed that he is entitled to the property by virtue of his purchase on 22.6.1978 under Ex.B-2 from Pattammal and Ors., who are the class I heirs of Kulandaivelu, the deceased brothers of Angamuthu.

14. Ex.B-4, dated 13.10.1978, is the certified copy of sale deed executed by Angamuthu and his brother Duraisamy in respect of various items including 65 cents in Survey No. 143/7 which was sold in favour of one Appavu Udayar. It is admitted that the suit property is comprised in Survey No. 143/7. In Ex.B-4, it has been specifically recited that there had been a division between the three brothers, namely, Angamuthu, Duraisamy and Kulandaivelu, that as per the partition, they are entitled to 65 cents in S. No. 143/7, which is being conveyed among other items under Ex.B-4 dated 13.10.1978 in favour of Appavu Udayar. Ex.B-4 refers not only to the partition between the three brothers but also refers to the remaining portion of Survey No. 143/7 as that of the defendant as he had purchased under Ex.B-2 dated 22.6.1978 from the heirs of Kulandaivelu.

15. That apart as seen from Ex.B-3 Angamuthu as well as Duraisamy by a deed of release executed on 30.9.1977 had confirmed the earlier partition between themselves and also confirmed the various properties as joint family properties in which each one of the brothers is entitled to 1/3rd share. In fact Ex.A-7 dated 30th September, 1977 has been produced by the plaintiff himself, which is a document of release executed by Angamuthu, and Duraisami in favour of one Chinnasamy, where the stand of the said brothers would disclose that there had been a partition between the three brothers even in respect of Survey No. 143/7.

16. A reading of these documents of purchase, as well as the partition or release would show that the land comprised in S. No. 143/7 in all measuring 1 acre, 4 cents was originally purchased by Angamuthu, which had subsequently been divided between the three brothers, namely Angamuthu, Kulandaivelu, Duraisami.

Angamuthu and Kulandaivelu had already sold 2/3rd share in Ex.B-4 dated 18.10.1978. If Ex.B-4 is admitted, it follows that Angamuthu had already sold his 1/3rd interest along with the interest of Duraisamy to Appavu Udayar, purchaser under Ex.B-4.

17. If it is to be accepted that Angamuthu had already alienated his share in S.F. 143/7, It is not known as to how once again the plaintiff had purchased Angamuthu's share namely 35 Cents in the said S.F. 143/7 from Angamuthu under Ex.A-1, dated 11.8.1980, which is much subsequent to Exs.B-4 as well as B-2. It is to be pointed out that Ex.A-7 has been produced by the plaintiff while the defendant has marked Ex.B-4 dated 13.10.1978 and B-3 dated 30.9.1977.

18. A reading of the above documents would disclose that there had been a division between three brothers and Angamuthu as well as Duraisamy alienated 65 cents under Ex.B-4 on 13.10.1978. If Ex.B-4 is accepted then no further extent of land or share in the suit Survey No. 143/7 is available for Angamuthu to convey it is in favour of the plaintiff. These aspects though highlighted by the contesting defendant had not been taken into consideration by the two courts below which vitiate the judgments.

19. Further the very recitals in Exs.B-3, B-4 and B-7 and other documents produced by either side not only prove that there had been division between three brothers, but they have also dealt with the divided property. If Division between three brothers is established, then the plaintiff will not be entitled to claim the suit property by his alleged purchase under Ex.A-2 as the defendant had validly purchased the property under Ex.B-2 on 22.6.1978, which is at the earlier point of time.

20. The two courts below had proceeded on the premises that the defendant had not established the partition and had also not produced the partition deed. It is true that the defendant had not established the alleged partition pleaded by him as he could not produce the partition release deed. But on that score, it cannot be said that the two courts below are justified in holding that there was no partition at all. The above material documents would show that there had been a partition.

21. The learned Counsel for the respondent contended that when Exs.B-2 and B-4 had not been proved by the defendant the two courts below are justified in excluding them from consideration. In this respect the learned Counsel for the appellant relied upon the decision of this Court in V.A. Amiappa Nainar and Ors. v. N. Annamalai Chettiar and Ors. : AIR1972 Mad154 , The Division Bench held that documents not being inter parties are inadmissible in evidence and the only method the recitals in a documents, which is not being inter parties could be admitted in evidence is by examining the executant of the document in which the recitals are found. In this respect the Division Bench held thus:

On a consideration of the aforesaid decisions, we hold that the decision of the Division Bench of this Court in 1914 M.W.N. 779 : A.I.R. 1915 Mad. 746 is in accordance with preponderance of authorities in various High Courts that recitals as to boundaries in documents not inter parties are inadmissible in evidence under Sections 11, 13(a), 32(3) and 32(7). As pointed out by Wadsworth, J., in : AIR1940 Mad450 , the only method by which recitals in a document not inter parties could be admitted in evidence is by 'examination of the executant of document in which such recitals as to boundaries are found. In this view of hold that judgment of Ramaswamy, J. in A.I.R. 1956 Mad. 226 is wrongly decided. The result is that Exs.A-2 to A-6 in the present case are inadmissible in evidence.

22. It is true that by a catena of decision, it has been held that the recitals as to boundaries in a document not inter partes are not admissible under Section 32. But it should not be forgotten that in the present case Ex.A-7 had been produced by the plaintiff himself and the defendant had produced Exs.B-3 and B-4, which were admitted and marked as Exhibits without objections.

23. Not only the recitals in those documents but also the boundary recitals therein would establish that the suit property belong to the defendant, who had purchased it on 22.6.1978 under Ex.B-2. That apart the documents would also show that there had been a division between Angamuthu and his two brothers and each has been allotted 1/3rd share in S.F. No. 143/7 and Angamuthu and his brother Duraisamy had already alienated 65 cents under Ex.B-4 dated 13.10.1978.

24. This Court pointed out to the counsel for the respondent that the above material documents were excluded from consideration as on the sole ground that the party to the said document has not been examined. The very same reason would also apply to Ex.A-6 produced by the plaintiff himself. It should not be forgotten that all these documents were marked with the consent of opposite parties and they have been marked as exhibits. Merely because, the parties connected to those documents have not been examined, the documents cannot be brushed aside altogether.

25. The Division Bench had considered the scope of marking the documents with the consent of either side. In fact the Division Bench of this Court in *A.V.S. Perumal, v. Vadivelu Asari* : (1986)1MLJ283 , had analysed the case law arising under Section 64 of the Evidence Act, where the documents have been marked with the consent of parties during the course of trial, it has been held that formal proof of the documents when marked by consent is not required. Venkataswami, J speaking for the Division Bench held thus:

The argument of the learned Counsel for the petitioner is that the principle of law laid down in *Manicka Mudaliar 's case* (1982) 95 L. W.297, is too wide and requires reconsideration. In any event, it is the contention of the learned Counsel for the petitioner that the lower appellate court ought not to have allowed the appeal by setting aside the judgment and decree of the trial court on the only ground that the documents marked in the trial court by consent could not be relied on as there was no oral evidence to prove the contents of the documents exhibited. The learned Counsel contended that when documents were marked by consent not only there was no further need for a formal proof of the documents, but also it would amount to proof of whatever the documents contained. In support of his contention, he has relied on the following cases, *Jainab Bibi Saheba v. Hydrally Sahib I.*(1980) Mad. 609 : A.I.R. 1920 Mad. 647 , *Latchayya v. Seetharamayya* : AIR1925 Mad257 , *Narasayya v. Krishnamoorthy* A.I.R. 1925 Mad. 1255 : 49 M.L.J. 228 : I.L.R. 48 mad. 225, *Purushothama Reddiar v. Perumal* : [1972]2SCR646 , *Kanchanganga Co. Ltd. v. State* : AIR1973 Cal325 and *Harnath v. Dhanee Devi* : AIR1975 Cal98 . Contending contra, the learned Counsel for the respondent-plaintiff submitted that the lower appellate court is right

in applying the law laid down in Manicka Mudaliar's case and allowing the application as well as the appeal. According to the learned Counsel even that though documents were marked in the trial court by consent, that will not absolve the respective parties from proving the contents of the documents so exhibited. According to him, the consent given for marking the documents will only absolve the parties from formally proving the documents and nothing beyond that. In support of his submission, the learned Counsel relied on the following judgments. Palaniappa Chettiar v. Bombay Life Assurance Co. Ltd. : AIR1948 Mad298 , Sait Tarjee Khimhand v. Yelamarti Satyam : AIR 1971 SC1865 and Karuppanna Thevar v. Rajagopala Thevar : AIR1975 Mad257 .

5. After going through the various citations given by the learned Counsel on both sides, we find that both the learned Counsel have put their respective propositions in the extremes. The correct proposition of law, we find, has already been laid down at least by two Division Bench judgments of this Court to which we will make reference immediately. Therefore, the issue is not res Integra. In our view, the principle of law laid down in Manicka Mudaliar 's cast (1982) 95 L. W. 297 is not wholly erroneous, but requires modification in the light of the earlier Division Bench judgment of this Court, In our view, it is unnecessary for as to refer to the view of other High Courts on this matter as the Division Bench judgments of this Court are binding on lis and we are also in respectfully agreement with those two Division Bench judgments. The principle laid down by the Supreme Court in Purushothama Reddiar v. Perumal : [1972]2SCR646 relied on the by the learned Counsel for the petitioner, has been correctly appreciated in one of the Division Bench judgments of this Court. We do not, therefore, propose to discuss the matter elaborately except to refer to relevant passages from the two Division Bench judgments of this Court which succinctly lay the proposition of law...

In Manicka Mudaliar's case (1982) 95 L. W. 227, the learned Judge has held as follows:

By merely making the documents by consent, the court is not obliged to look into the contents unless those documents are formally proved in accordance with the provisions of the Indian Evidence Act.

[Italics supplied]

We think, with respect to the learned Judge, the above proposition is too wide and needs modification. The correct position as found by the earlier Division Bench approved by the later Division Bench is as follows:

Permitting a document to be marked by consent only means that the party consenting is willing to waive his right to have the document in question proved. The learned single Judge, in Manicka Mudaliar's case, has taken the view that formal proof also is required notwithstanding the fact that the document was marked by consent. To that extent, the learned Single Judge with respect is not right.

26. As already pointed out, both parties have produced the documents to which they are not parties and they were marked with the consent of either side. The effect of such marking would be the concerned parties are willing to waive his right to have the document proved by letting in formal evidence by examining the parties to the document.

27. In the circumstances, it cannot be said that the parties have objected to the marking of the document, though they are not parties and by consent, the documents, have been marked. Despite that, the two courts below have declined to consider those documents. This failure on the part of the two courts below to consider the documents vitiates their conclusion and in particular to the findings as to whether the suit property has been purchased by the defendant and as to whether the boundary recitals in Exs.B-3 and B-4 would confirm the defendant's claim of title.

28. In the light of the said pronouncement, this Court would be justified in re-appreciating the documentary evidence as well as oral evidence. However, this Court would not be justified in re-appreciating the contents of the documentary as well as oral evidence at the second appellate stage, as the unsuccessful party will not have an opportunity to challenge the findings so recorded. As the two courts below have failed to advert or consider material evidence, as the two courts below have declined to refer the material documents on an erroneous reasoning and as

the two courts below have declined to consider the documents and the recital therein more on the reasoning that there is no proof, the judgment of the two courts below are liable to be set aside.

29. This Court will not be justified in reappreciating the documents at this stage as well as the oral evidence in the light of the later Division Bench judgment of this Court. As the two courts below have failed to consider the material documents and as they have failed to consider those documents with respect to the admissibility of evidence, this Court has no other alternative except to set aside the judgment of the two courts below and remit the matter back to the first appellate court for fresh consideration.

30. This Court is aware that remand after fifteen years should be avoided. But this Court has no other alternative except to remit the matter to the first appellate court for fresh consideration as the material documents have been excluded from consideration and as the two courts have failed to consider the documents, which have been admitted and marked with the consent.

31. In the foregoing circumstances, the Second Appeal is allowed, the judgment and decree of the two courts below are set aside and the appeal will stand remitted to the first appellate court for fresh consideration.

32. In the light of the above observation, it is made clear that it is open to either side to let in further oral and documentary evidence. The court fee paid on the appeal memorandum is ordered to be refunded to the appellant. Both parties shall appear before the first appellate court on 16th June, 1999.