Appadurai and Another Vs. Selvan

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Court : Chennai

Decided On : Sep-04-2012

Judge : G. Rajasuria

Appeal No. : S.A. No. 6 of 2006

Appellant : Appadurai and Another

Respondent : Selvan

Advocate for Pet/Ap. : For the Appellants: S. Parthasarathy, Sr. Counsel, for M/s. Sarvabhauman Associates, Advocates. For the Respondent: P. Vlliappan, Advocate.

Judgement :

(Prayer: Second Appeal against the judgement and decree dated 13.9.2005 passed by the Sub Court, Ariyalur, in A.S.No.22 of 1999 reversing the judgement and decree dated 24.6.1999 passed by the District Munsif ourt, Jeyankondam, in O.S.No.346 of 1996.)

1. This second appeal is focussed by the defendants in the suit as against the judgement and decree dated 13.9.2005 passed by the Sub Court, Ariyalur, in A.S.No.22 of 1999 reversing the judgement and decree dated 24.6.1999 passed by the District Munsif Court, Jeyankondam, in O.S.No.346 of 1996, which was one for declaration and for injunction.

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

3. Compendiously and concisely, the germane facts absolutely necessary for the disposal of this second appeal would run thus:

(i) The respondent herein, who happened to be the plaintiff, filed the suit for declaration and injunction in respect of an extent of 27 cents of land in S.No.470/9.

(ii) The first appellant herein/first defendant filed the written statement, which was adopted by the second defendant, resisting the suit.

(iii) Whereupon the trial Court framed the issues.

(iv) During trial, the plaintiff examined himself as P.W.1 along with P.Ws.2 to 4 and marked Exs.A1 to A3. The first defendant examined himself as D.W.1 along with D.Ws.2 to 6 and marked Exs.B1 to B14. Exs.X1 and X2 were marked as Court documents.

(v) Ultimately, the trial Court dismissed the suit.

(vi) Impugning and challenging the said judgement and decree of the trial Court, the respondent herein/plaintiff preferred the appeal; whereupon, the first appellate Court reversed the findings of the trial Court and decreed the suit in toto.

4. Being aggrieved by and dissatisfied with the said judgement and decree of the first appellate Court, the defendants preferred this second appeal on various grounds.

5. My learned predecessor framed the following substantial questions of law:

"a) When the husband of the alleged vendor of the respondent had attested in Ex.B2-sale deed in favour of the vendor of the appellants, whether it is open to the respondent to assert title in his vendor, in contravention of the provisions of Section 115 of the Evidence Act 1872?

b) Whether the learned Sub Judge is right in rejecting Exs.B1 to B14 material documents which would conclusively negative the case of the respondent?

c) When the appellants had established their right and title by producing registered sale deeds, patta, chitta and kist receipts, whether the learned Sub Judge is right in discarding the material documents?

d) Whether the learned Sub Judge is correct in reversing the judgment of the learned District Munsif, without even setting aside the findings rendered by the trial Court?

e) Whether the learned sub Judge is correct in law in ignoring the admissions made by P.Ws.1 to 4, during cross examination, especially when it is well settled in law that the admission of the opposite party is the best evidence?

f) Whether the plea of estoppel will operate against the appellants with regard to Ex.A2-Sale Deed, particularly when the vendor thereunder did not have valid title and the document itself is invalid in law?"

(extracted as such)

6. Indubitably and indisputably, the germane facts as found exemplified in the plaint would be to the effect that the plaintiff purchased an extent of 27 cents of land in S.No.470/9 as found described in the schedule of the plaint as per Ex.A2-the sale deed dated 22.7.1994 from Muthukannuammal.

7. It is precisely the contention of the plaintiff that the first defendant, who purchased 8 cents of land in S.No.470/9 from the vendor of the plaintiff, an area to the north of the land specified in Ex.A2, cannot veer round and take a plea quite antithetical to what he accepted earlier in his sale deed Ex.A1 dated 23.8.1982 that his vendor was the owner of the aforesaid entire extent.

8. The defendants would contend that the 8 cents of land in S.No.470/9, from out of the total extent of 70 cents was purchased by the first defendant erroneously from one Muthukannuammal, vide sale deed-Ex.A1 dated 23.8.1982, believing that she happened to be the owner of the suit property. Subsequently, D1 got

clarified that in fact Muthukannuammal was not the owner, but in fact the legal heirs of Narayanasamy Naidu happened to be the real owners and hence, as per sale deed-Ex.B1 dated 26.12.1983, he purchased the same 8 cents from the said legal heirs of Narayanasamy, namely, Krishnammal and othgers. Simply because D1 out of misconception as per Ex.A1-the sale deed dated 23.8.1982 purchased the 8 cents of land, he cannot be fastened with liability to accept whatever Muthukannuammal sold to the plaintiff. Over and above that after such ambiguity having got disambiguated, D2-the brother of D1 purchased from the said Narayanaswamy's heirs, 24 cents of land in the same S.No.470/9 to the South of the area contemplated in Ex.A1-the sale deed dated 23.8.1982 as well as in Ex.B1-the sale deed dated 26.12.1983. In fact, Narayanaswamy purchased the total extent of 35 cents of land in S.No.470/9 from Palanivel and others, vide sale deed-Ex.B2 dated 21.3.1964. The antecedent title deed to Ex.B2 is Ex.X1-the sale deed dated 11.5.1939. Out of the total extent of 35 cents of land, as per Ex.B1-the sale deed dated 26.12.1983, an extent of 8 cents and as per Ex.B13-the sale deed dated 21.8.1995-an extent of 24 cents, were purchased by D2 and the remaining 3 cents out of the total extent of 35 cents were allotted for path way as per the Panchayat decision. Wherefore the defendants prayed for the dismissal of the suit.

9. The learned counsel for the appellants/defendants would pyramid his arguements which could pithily and precisely be set out thus:

(i) The trial Court taking into account the pro et contra, correctly dismissed the suit, as the said Muthukannuammal had no title at all to alienate any portion of the 35 cents of land in S.No.470/9. However, the first appellate Court, without any valid reasons simply upset the reasoned findings of the trial Court and decreed the suit in toto, throwing to winds the established principles that the 'onus probandi' was on the plaintiff to prove his case.

(ii) The lower appellate Court misunderstood the purport of Ex.A1-the sale deed dated 23.8.1982 as well as Ex.B1-the sale deed dated 26.12.1983 and jumped to the conclusion as though the defendant No.1 and for that matter, his brother were estopped from resiling from their previous alleged commitments in black and white in the form of Ex.A1. According to the learned counsel for the defendants, any

litigant is entitled to get himself corrected, after coming to know of the real facts.

(iii) In this case also D1 even though purchased an extent of 8 cents from Muthukannuammal on the misconception that she was the owner, thereafter by making enquiries in the village, got disillusioned and in the meantime got enlightened about the real ownership of the entire extent of 35 cents of land in S.No.470/9; whereupon alone he, incurring additional expenditure, purchased the very same property measuring 8 cents contemplated in Ex.A1, as per Ex.B1-the sale deed dated 26.12.1983 from the legal heirs of Narayanasamy, which is indicative of the fact that D1 was fair enough in perfecting his title by purchasing it from the proper owner. But the appellate Court painted D1 black and arrived at the conclusion as though he was having no good case of his own and that he wanted to usurp the property of the plaintiff.

(iv) The antecedent original deed Ex.X1, dated 11.5.1939 would prove the title of Narayanaswamy's vendor and and throw much light on the issue and consequently Ex.B2-the sale deed dated 21.3.1964 would further strengthen the contention of the defendants.

Accordingly, the learned counsel would pray for dismissal of the suit, after setting aside the judgement and decree of the first appellate Court and for restoring the judgement and decree of the trial Court.

10. Whereas, the learned Senior counsel for the respondent/plaintiff would advance his arguements, which could tersely and briefly be set out thus:

The first appellate Court cutting across the technicalities, saw the reality and held that the defendants were having prevaricative stands. There is no clarity at all in the contention of D1 and D2 and they had inconsistent stands, which exposed their real intention, whereupon the first appellate Court decreed the suit based on Ex.A2-the sale deed dated 22.7.1994.

11. Substantial Question of Law (a): At the outset I would like to fumigate my mind with the following maxims:

(i) Affirmantisest probate - the person who affirms must prove.

(ii) Affirmanti, non neganti, incumbitk probatio. - the Proof is incumbent on the one who affirms, not on the one who denies.

12. No doubt, the plaintiff being the dominuslitis could come forward with a case of his own. However he is bound to prove his case and if at all the burden of proof, as it is ambulatory, gets shifted to the defendants, then only the defendants should be expected to prove their case.

13. It is palpably and pellucidly clear that there is lot of unanswered questions in this case. In order to understand the complications involved in this matter, it is absolutely just and necessary to extract hereunder the schedules of property, as found set out in the plaint, Ex.A1-the sale deed dated 23.8.1982 executed by Muthukannuammal in favour of the first defendant; Ex.A2-the sale deed dated 22.7.1994, executed by Muthukannuammal in favour of the plaintiff, Ex.B2-the sale deed dated 21.3.1964 executed by Palanivel and others in favour of Narayanaswamy and Ex.X1-the sale deed dated 11.5.1939 executed by Ayyaswamy and his minor sons in favour of one Salashi and also Ex.B11-the Gift Settlement Deed dated 14.12.1971 executed by a third party to one other person.

“TAMIL”

14. The learned counsel for the plaintiff, in order to probabilize the case of his client, would place reliance on the description in Ex.B11-the Gift Settlement Deed dated 14.12.1971 and portray and project his arguement that Narayanaswamy was found to be one of the boundary owners in the settlement deed executed by the third party in favour of yet one another third party and that is indicative of the fact that Narayanaswamy was owning land in that vicinity.

15. This Court raised the query as to how then he would be able to explain and expound the specification in Ex.B11-the Settlement deed dated 14.12.1971 itself that Muthukannuammal is also one of the boundary owners in it, for which, I could not get any plausible answer and for that matter, the learned counsel for the plaintiff could not expound anything.

16. This is a crucial point, which cannot be lost sight of. In all fairness, the learned counsel for the defendants would point out that in Ex.X1, the undivided share of 35 cents alone, was depicted, out of the total extent of 70 cents in S.No.470/9. There is no knowing of the fact as to when that undivided share was got carved by metes and bounds from the total extent of 70 cents.

17. Both sides faintly would try to project a case that Muthukannuammal and the vendor of Narayanaswamy happened to be relatives. As such, the Court cannot jump to the conclusion in favour of either of the parties. Wherefore I observed supra that there are so many unanswered questions in this case. If importance has to be given to the description of boundaries as found set out in Ex.B11-the settlement deed dated 14.2.1971 executed by a third party in favour of one other third party, then that has to be explained as to how that could be fitted into the descriptions as found in the other documents referred to supra and there is no coherence also.

18. At this juncture, I would like to point out that in this case no Commissioner was appointed to visit the property concerned and measure it and try to locate it with reference to Revenue records as well as the aforesaid deeds. Unless such an exercise is undertaken with the help of the parties as well as the Revenue officials, it would be amounting to trying to catch a black cat in a dark room.

19. The Court cannot throw the baby along with bathe water. It could easily be labelled and dubbed relying on mere burden of proof that the plaintiff's case is a basket case, but that should not be done.

20. I fumigate my mind with the popular adage 'every trial is a voyage, in which truth is the quest'. The Honourable Apex Court referred this adage in the following recent judgements:

(i) AIR 2012 SC 2010 - A.SHANMUGAM V. ARIYA KSHATRIAY RAJAKULA VAMSATHU MADALAYA Nand HAVANA PARIPALANAI SANGAM;

(ii) (2010)10 SCC 677- RITESH TEWARI and ANOTHER V. STATE OF UTTAR PRADESH and OTHERS.

butit appears, neither the trial Court nor the first appellate Court ventured to undertake this exercise, but they simply decided in their own way the matter and thereby, in my considered opinion, justice was not rendered.

21. No doubt, the plaintiff during the second appeal stage filed the miscellaneous petition for marking the following additional documents:

(i) F.M.B.Sketch of Suit S.No.470;

(ii) A Register Extract for suit S.No.470 (Resettlement Register)

This exercise ought to have done even at the trial stage.

22. The learned Senior counsel for the plaintiff would try to point out that as per the Revenue records, so to say, including 'A' register, the father of Muthukannuammal was described as the owner of the property concerned. However, the learned counsel for the appellants/defendants would impugn and challenge the same.

23. Be that as it may. Now in second appeal, this Court is not going to entertain all these documents however, liberty has to be given to both sides to produce both oral and documentary evidence before the first appellate Court.

24. Unless the Commissioner visits the suit property and measures it with the help of the Government Surveyor, based on the Revenue records and also the aforesaid documents, there will not be any clarity at all. In matters of this nature, mere oral evidence would not bare fruit and mere interpretation of the oral evidence would further complicate the matter.

25. In view of my above finding, I am of the considered view that at this stage this Court need not probe further into it. However, for the purpose of guidance of the lower Court I would refer to the following decision of the Division Bench of this Court.

2003(1) CTC 745-K.A.SELVANACHI and ANOTHER V. DR.S.R.SEKAR and ANOTHER, certain excerpts from it would run thus:

"9. The learned single Judge placed reliance on the decision of a single Judge of this Court, Ismail,J., as he then was, in the case of Ramasamy Gounder v. Anantapadmanabha Iyer (1971-1-M.L.J.392), wherein the learned Judge referred to decisions rendered by learned single Judges in two old cases viz., Sathasiva Iyer,J. In Kandasamy v. Nagalinga (1912) I.L.R.36 Mad 564 and Narayana v. Rama I.L.R.(1915 38 Mad 396 and that of Kumaraswami Sastri,J. In the case of Nayakammal v. Munnaswamy Mudaliar (1924) 20 L.W.222. Sathasiva Iyer,J.in the case of Kandasamy referred to the "ordinary course of conduct of Indians in this presidency" and held that attestation must be treated prima facie as a representation by the attestor that the title and other facts relating to title recited in the document are true and that they will not be disputed. The learned judge also observed that in his long experience as judicial officer, if the attestor has an existing interest in the property dealt with in the document attestation was always made in order to bind him as to the correctness of the recitals. Kumaraswami Sastri,J., in the case of Nayakammal, observed that "it is the commonest thing in this country for attestations to be obtained from persons having a possible interest in the property with the object of binding them later on" and that "I have rarely come across a case where a person having and interest present or contingent has attested the deed without enquiring into its contents".

19. Those observations made by the learned judges cannot be treated as having laid down a proposition of law that all attestors of all documents must be imputed with knowledge of the contents thereof and even when such contents are adverse to the interest of the attestors so that the attestors are estoped from questioning the same solely by reason of the fact of their having attested the document. Observations based on personal perceptions and experience of individual Judges cannot be elevated to the status of Rules of law. Custom and usage are always a matter of evidence and strict proof.

11. Those observations are also clearly inconsistent with the law that had been laid down by the Privy Council in the case of Pandurang Krishnaji and cannot be regarded as having laid down such inconsistent law. Moreover, whatever may have been the practice in the year 1912 or 1924, the same cannot be regarded as the practice even eighty years later, when the awarness of the requirements of law

is far greater than what it was eighty years ago. Further, on principle it is not possible to hold that attestation of a signature is to be deemed as acceptance of the contents of the document which has been executed by the signatory whose signature is attested by the attestor. There should be something more than mere attestation to impute such knowledge of the contents so as to bind the attestors.

12. We have already noticed that in this case there is no material at all to show that the mother who attested the partition deed was aware of the contents thereof or had accepted the same. When she was examined as D.W.1 in this case, she specifically stated that she had no knowledge of the contents of the partition deed and that she came to know of it only when the suit was filed in the year 1984.

13. The title of the plaintiff's mother, therefore, was wholly unaffected by the recitals in the partition deed to which she was not a party and that partition deed did not have the effect of divesting her of her title and vesting the same in her husband. The mother also cannot be regarded as the benamidar of her husband, as there is no materials at all to show that she had accepted her position as benamidar and there is no decree of any Court declaring the title of the father as the owner despite the fact that the title deeds and the entries in the Municipal records stood in the name of the mother. The subsequent family arrangement does not improve the matter in any way as the father who himself did not have title to the property prior to the partition could not have parted with the same in favour of his son. The mother had at all times remained the owner of the property. She had dealt with the property as hers as evidenced by the petition filed by her against the tenant in the year 1982. It is also evident from her deposition that her actions had the implicit support and acceptance of her husband as they were living together at all times.

14. The plaintiff cannot assert title to the property on the strength of the family arrangement and the partition deed that preceded it. The plaintiff has failed to establish his title. The plaintiff not being entitled to the declaration sought, no question of granting any consequent relief arises for consideration."

26. The aforesaid precedent would exemplify and indicate that mere attestation of a document by a person would not amount to his relinquishment of his right over

the property described in the deed.

27. Accordingly, the substantial questions of law are answered as under:

"Substantial Question of Law (a) is decidedto the effect that mere attestation of Ex.B2-the sale deed dated 21.3.1964 by the husband of Muthukannuammal itself would not be the decisive factor for deciding the lis.

Substantial Question of Law (b) is concerned, the appellate Court rejected Exs.B3 to B14-the Revenue Records and unless the property is measured as stated supra, the question of finally deciding their relevancy would not arise."

28. In view of my discussion supra relating to Substantial Questions of Law (a) and (b), the deciding of the substantial questions of law (c) to (f) at this stage would not arise. Wherefore the judgement and decree of the first appellate Court is set aside and the matter is remitted back to the first appellate Court, namely, the Sub Court, Ariyalur, to appoint an Advocate Commissioner at the cost of both the parties with the mission to visit the suit property with the help of a Government Surveyor and measure the same with reference to the Revenue Records and also the documents Exs.B3 to B14-the Revenue records and locate the same. Due opportunity to both sides to file additional oral and documentary evidence shall be given and on hearing both sides, a reasoned judgement shall be delivered. The lower appellate Court shall do well to see that the entire matter is disposed of within five months from the date of receipt of a copy of this judgement. Both parties shall appear before the first appellate Court, namely, the Sub-Court, Ariyalur, on 4.10.2012. The Registry shall send back the records at once.

29. The second appeal is disposed of accordingly. However, there is no order as to costs.