

Banumathi Vs. M.Vasantha

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Court : Chennai

Decided On : Apr-02-2013

Judge : G.Rajasuria

Appellant : Banumathi

Respondent : M.Vasantha

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

02. 04.2013 Coram: THE HONOURABLE MR.JUSTICE G. RAJASURIA
S.A.No.1344 of 2004 and C.M.P.No.828 o

1. Banumathi 2. Punithavathi 3. Anbuselvi 4. Hemalatha 5. Arulmozhi .. Appellants
Vs.

1. M.Vasantha 2. Senthilkumar (died) 3. Chinnammal 4. Rajeswari 5. Nagarajan 6. Kanimozhi 7. S.Poongodi 8. Minor Ramalingam 9. Minor Praveen Rajkumar .. Respondents
Minors 8 and 9 represented by their mother and next friend S.Poongodi R3 recorded as LR of the deceased R2 and RR7 to 9 brought on record as Lrs of the deceased R2 vide order of court dated 15.02.2013 made in C.M.P.No.829 of 2012 in S.A.No. 1344 of 2004. This second Appeal is focussed as against the judgment and decree dated 31.12.2003 passed by the learned Subordinate Judge, Sankari in A.S.No.64 of 1998 in confirming the judgment and decree dated 24.06.1998 passed by the learned District Munsif, Sankari in

O.S.No.23 of 1996. For appellants : Mr.N.Manokaran For Respondents : Mr.N.Sankaravadivel for Mr.V.Manohar for R1 Mr.M.V.Karunakaran for RR3 to 6 Mr.V.Babu for RR7 to 9 JUDGMENT This second appeal is focussed by D2 to D6, animadverting upon the judgment and decree dated 31.12.2003 passed by the learned Subordinate Judge, Sankari in A.S.No.64 of 1998 in confirming the judgment and decree dated 24.06.1998 passed by the learned District Munsif, Sankari in O.S.No.23 of 1996.

2. The parties are referred to here under according to their litigative status and ranking before the trial Court.

3. Compendiously and concisely, the germane facts absolutely necessary and germane for the disposal of this Second Appeal would run thus: (a) The plaintiff filed the suit for partition seeking the following reliefs: (i) to pass a preliminary decree for partition of the suit properties in to 6 equal shares by metes and bounds taking into consideration of the value of the property, convenience of enjoyment of the same and allot one such share to the plaintiff and put her in separate possession of the same and (ii) costs of the suit to be paid by the defendants to the plaintiff. (extracted as such) citing the following properties VERNACULAR (TAMIL) PORTION DELETED on the main ground that the suit properties described in the schedule of the plaint originally belonged to one Muthu Padayachi, who died on 15.09.1976 leaving behind his second wife D1-Chinnammal and D7 to D9, the children born to him through D1 and also his children, namely, the plaintiff and S.M.Krishna, born through his pre-deceased first wife Chinnammal. As such, as on the date of the death of the original owner viz., Muthu Padayachi, as per Section 8 r/w Class I of the Schedule of the Hindu Succession Act, 1956, the entire suit properties devolved upon those six sharers and the plaintiff was entitled to 1/6 th share. Since the defendants were not co-operative for an amicable partition, the suit was filed. (b) Pending litigation D8 died; whereupon, her husband D10 and her minor son D11 were added. Since D10 remained exparte, for D11- the minor, the court guardian was appointed, who filed the written statement. (c) In fact, D7 and D8 paid separately the court fees, in respect of their shares, to be allotted to them. (d) Since S.M.Krishna died even before the suit, his legal heirs, viz., D2 his widow and D3 to D6, his children were

added. (e) D2 on her behalf and on behalf of D3 to D6, by way of challenging and impugning the averments/allegations in the plaint, filed the written statement, contending as follows: (i) The suit properties are not the self-acquired properties of deceased Muthu Padayachi; but he purchased them from out of the joint family funds. Hence, the plaintiff is not entitled to any share. (ii) S.M.Krishna discharged the mortgage debt created by Muthu Padayachi over the suit properties. (iii) S.M.Krishna was running a hotel in a portion of the suit property. Accordingly, she prayed for the dismissal of the suit. (f) Others have not filed any written statement. (g) The trial Court framed the relevant issues. (h) Up went the trial, during which on the plaintiff's side, P.W.1 was examined and Exs.A1 to A7 were marked. On the defendants' side no one was examined and no document was also marked.

4. Ultimately the trial Court decreed the suit accepting the contention of the plaintiff that Muthu Padayachi died leaving behind his six legal heirs and that each one was entitled to one share.

5. Challenging and impugning the judgment and decree of the trial court, D7-Senthil Kumar preferred the appeal; whereupon, the first appellate court dismissed the appeal, confirming the judgment and decree of the trial court.

6. Being aggrieved by and dissatisfied with the judgments and decrees of both the fora below, this second appeal has been filed by D2 to D6 on various grounds, suggesting various substantial questions of law.

7. My learned predecessor at the time of admitting the second appeal, formulated the following substantial question of law : (i) Whether the decree granted by the courts below will bind the parties who were minors at the time of trial, particularly when their interest were not properly represented by the guardian though the guardian is not the guilty of fraud or collusion, has conducted the suit with gross negligence? (extracted as such) 8. Heard all the advocates concerned.

9. The learned counsel for the appellants/D2 to D6 would pyramid his argument, which could succinctly and precisely be set out thus: (i) The courts below failed to take note of the fact that the minors' interest, so to say, the interest of D3 to D6 was not protected as their father S.M.Krishna discharged the mortgage debt

incurred by Muthupadayachi during his life time. (ii) The relevant documents were not also filed. As such, in this second appeal, they filed C.M.P.No.828 of 2012 under Order 41 Rule 27 of CPC to adduce additional evidence by relying on those documents as under:

1. Sale Deed dated 11.08.1961 [Doc.No.1688 of 1961] in the name of Muthupadayachi 2. Mortgage deed dated 1.08.1961 [Doc.No.1689 of 1961] executed by Muthupadayachi 3. Redemption of mortgage receipt dated 11.08.1980 [Doc.No.666 of 1980] in the name of S.M.Krishnan. (iii) Minor's interest should be protected and the mere perusal of the records would demonstrate and exemplify that the case was not conducted properly and for that matter, D2 the mother of the minors D3 to D6 not even adduced any evidence and virtually allowed the suit to be decreed in favour of the plaintiff, warranting interference in second appeal. (iv) Over and above that the learned counsel for the appellants/D2 to D6 would submit that the courts below failed to take note of the fact that the suit properties are all the joint family properties, over which, the plaintiff, being a lady, was not entitled to any share. (v) Had D2 taken steps to adduce evidence, the matter would have been different. Because, she happened to be a lady, she allowed the matter to proceed without any resistance and it so happened that the plaintiff thought that it was a low hanging fruit, which she could pluck easily and accordingly, she achieved her object. (vi) The jurisprudence mandates that the minor's interest, should be jealously and zealously guarded by the courts as otherwise, their interest would get eroded once and for all. Accordingly, he would pray for setting aside the judgments and decrees of both the courts below.

10. Whereas in a bid to torpedo and pulverise and to slap down the arguments as put forth on the side of the appellants/D2 to D6, the learned counsel for the respondent 1/plaintiff would advance his arguments, which could tersely and briefly be set out thus: (i) The minors' interest was properly safe-guarded as the court appointed a guardian for D11 in view of the fact that D11's father-D10 remained exparte. (ii) Insofar as D2 is concerned, she represented her minor children, D3 to D6 and hence there was no necessity for the court to appoint any guardian for them. It is only an after thought on the part of the defendants to advance arguments to get the court's sympathy as though the minors' interest got

eroded. There is no iota or shred, shard or molecular extent of evidence to display and convey that the properties happened to be the joint family properties. (iii) The contention on the side of the appellants/D2 to D6 that S.M.Krishna discharged the mortgage debt, is nothing but an allegation, which emerged out of their figment of imagination, unworthy of being considered by this court.

11. The learned counsel for respondents 3 to 6/ D1 and D9 to D11 would advance his argument, which could succinctly and precisely be set out thus: (i) The very first appeal filed by D7 after virtually submitting to decree and paying the court fee for allotting his share, was non-est in the eye of law. (ii) The first appellate court ultimately dismissed the appeal and no first appeal was filed by the present appellants/D2 to D6. Hence, this second appeal should not have been numbered at all as there is no question of law much less substantial question law, is involved in this matter.

12. At the outset, I would like to fumigate my mind with the recent decision of the Hon'ble Court reported in 2012 (8) SCC 14.[Union of India v. Ibrahim Uddin and another]; an excerpt from it would run thus: "59. Section 100 CPC provides for a second appeal only on the substantial question of law. Generally, a second appeal does not lie on question of facts or of law. In SBI v. S.N.Goyal (2008) 8 SCC 92.this Court explained the terms "substantial question of law" and observed as under: (SCC p.103, para

13) "13.....The word "substantial" prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the partiesany question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law.....There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case." (emphasis added) 13. My learned predecessor

after perusal of the records formulated as extracted supra only one substantial question of law. Hence, it is enough for me to ponder over that substantial question of law and render my judgment.

14. No doubt, the jurisprudence pulling no punches, would portray and parody, highlight and spotlight the fact that interest of three persons should be protected, viz., (i) the minor (ii) the widow and (iii) the mentally challenged person. It thereby connotes and denotes that the interest of the minor should be protected zealously by the court.

15. Here, it has to be seen as to whether, even a miniscule extent of the interest of the minors got affected because of the findings rendered by the court.

16. Indubitably and indisputably, Muthupadayachi died on 05.09.1976 leaving behind all his legal heirs, viz., (i) the plaintiff (ii) S.M.Krishna the husband of D2 and father of D3 to D6, (iii) D1 - the second wife of Muthupadayachi (iv) to (vi) namely, D7, D8 and D9.

17. The learned counsel for the appellants/D2 to D6 would try to narrate the facts to the effect that the minors did not have had an opportunity of torpedoing and pulverising, smashing and demolishing the case of the plaintiff as though the properties were the self-acquired properties of Muthupadayachi. No doubt, if on the side of the appellants any iota or jot of evidence could be shown before this court that those properties were purchased by Muthupadayachi from out of the alleged joint family properties or income then the matter would be different.

18. But here, in the CMP No.828 of 2012 the aforesaid three documents were sought to be filed and the first document, in my considered opinion, is nothing but the sale deed in the name of Muthupadayachi relating to the first item of the suit properties and when this court called upon the learned counsel for the appellants/D2 to D6 to point out as to whether there is any indication that the suit properties were purchased from out of the joint family income, the learned counsel for the appellants/D2 to D6 could not pin point out any such evidence.

19. Merely because in the written statement, there is an allegation to the effect that the properties were purchased by Muthu Padayachi from out of the joint family income, it cannot be taken for gospel truth and their statements remain only their ipse dixit.

20. In such a case, there is no question of holding that the minors' interest got eroded etc.

21. The learned counsel for the appellants/D2 to D6 by placing reliance on the two other additional documents filed in the C.M.P.No.828 of 2012 would project and portray that it was S.M.Krishna, who discharged the mortgage debt.

22. No doubt, the mortgage debt as well as the discharge receipt were not filed on the side of the appellants herein before the courts below; nonetheless the law adequately protects their interest. In any partition proceedings, enquiry under Order 20 Rule 12 of CPC is permissible at the instance of all or either of the parties. During final decree proceedings, a broad based roving enquiry can be undertaken by the court itself to find out as to how much income was derived out of the joint properties and how that income should be shared etc., and at that time, it is open for the appellants/D2 to D6 to show up and point up that S.M.Krishna alone discharged the mortgage debt and that he was in possession of the original mortgage deed as well as the discharge receipt and that others should prune their claims correspondingly.

23. Not to put too fine a point on it, when such a remedy is there, there is no knowing of the fact as to how the minors could be termed as the persons who had lost their beneficial interest in the suit properties.

24. Relating to the plea raised by the learned counsel for D1 and others that the appellants had no locus standi to file the second appeal, I would like to recollect and call-up the trite proposition of law that in a partition suit, plaintiff is the defendant and vice versa. One of the defendants, viz., D7 filed the appeal, arraying the present appellants in the second appeal as respondents and the dismissal of such first appeal paved the way for the appellants herein to file this second appeal.

25. Indubitably and indisputably, unarguably and incontrovertibly, the appellants herein happened to be the respondents therein, who participated in the first appeal, in such a case, they are having the right to file second appeal.

26. As such, I do not visualize that they had no locus standi to prefer this second appeal, but such second appeal should be one within the parameters of Section 100 of the CPC and they must be able to make out the substantial question of law. On analysis it is found as set out supra by me that absolutely, there is no substantial question of law in stricto sensu involved in this case and accordingly, the substantial question of law framed, is answered to the following effect: The judgments and decrees of both the fora below are not stood vitiated due to the alleged reason that the minors' interest were not properly represented.

27. In the result, this second appeal is dismissed with the observation that the appellants are at liberty to file those additional documents during the final decree proceedings as observed supra by me and work out their remedy. As such, C.M.P.No.828 of 2012 is closed. No costs.

28. On hearing the judgment pronounced, the learned counsel for the appellants would express the grievance that the respondents herein are trying to dispossess the appellants forcibly, for which the learned counsel for the respondents would vehemently oppose the same and point out that the appellants are collecting rents and not sharing it with the other co-sharers.

29. To the risk of repetition and pleonasm, but without being tautologous I would like to point out that it is open for the parties having grievance to approach the court concerned during final decree proceedings and get suitable orders. To 1. The Subordinate Judge, Sankari 2. The District Munsif, Sankari vj2

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