

indrani Vs. Vijayakumar

indrani Vs. Vijayakumar

SooperKanoon Citation : sooperkanoon.com/965303

Court : Chennai

Decided On : Mar-14-2013

Judge : G. Rajasuria

Appellant : indrani

Respondent : Vijayakumar

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

14. 03.2013 Coram: THE HONOURABLE MR.JUSTICE G. RAJASURIA
S.A.No.1170 of 2011 and M.P.No.1 o

1. Indrani 2.Anaiappan ... Appellant vs. Vijayakumar ... Respondent This Second Appeal is focussed as against the judgment and decree dated 21.12.2010 passed by the Principal District Court, Villupuram, in A.S.No.98 of 2010, confirming the judgment and decree dated 15.12.2009 passed by the Principal District Munsif, Ulundurpet, in O.S.No.25 of 2008. For appellants : Mrs.Hema Sampath,Sr,counsel for Mrs.R.Meenal For respondent : Mr.C.Prabhakaran JUDGMENT This Second appeal is focussed by the plaintiffs animadverting upon the judgment and decree dated 21.12.2010 passed by the Principal District Court, Villupuram, in A.S.No.98 of 2010, confirming the judgment and decree dated 15.12.2009 passed by the Principal District Munsif, Ulundurpet, in O.S.No.25 of 2008, which was one for declaration and permanent 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. Niggard and bereft of unnecessary details, the germane facts absolutely necessary for the disposal of this second appeal would run thus: (i) The gist and kernel of the plaint averments would be to the effect that the properties described in the schedule of the plaint was purchased by the second plaintiff (Anaiappan), vide two sale deeds Ex.A1-dated 29.4.1979 and Ex.A2-dated 5.8.2009. (ii) The said Anaiappan in turn sold those properties in favour of his daughter-in-law, namely, the first plaintiff-Indirani (wife of Sivakumar, who is the son of Anaiappan), vide sale deed-Ex.A3 dated 7.12.2007. (iii) According to the plaintiffs, the defendant-Vijayakumar, without any basis, started interfering with the peaceful possession and enjoyment of the suit properties by the first plaintiff-Indirani, which necessitated her to file the suit, seeking the relief of declaration of her absolute title over the suit properties and for injunction as against the defendant. (iv) Per contra, the defendant in a bid to resist the suit, filed the written statement setting out various pleas, the pith and marrow of them would run thus: (a) The said Ananppan was in possession of the ancestral properties on behalf of himself and his two the then minor sons, namely, Sivakumar (the husband of the first plaintiff) and Vijayakumar (defendant); while so, vide Ex.B1-the sale deed dated 23.4.1979, he sold those properties on his behalf and on behalf of his the then two minor sons. Hardly six days thereafter, he purchased in his own name, from out of the said sale proceeds, the suit properties, vide sale deeds-Exs.B2(Ex.A1) dated 29.4.1979 and Ex.B3(Ex.A2) dated 15.7.1980. (b) Thereafter, in order to deprive the defendant-Vijayakumar of his right over those properties, which are to be construed and deemed to be ancestral properties, the second plaintiff (Anaiappan) sold the same to the first plaintiff-Indirani, vide Ex.A3 dated 7.12.2007, as though he got valid consideration for the same from her, even though the said sale deed is a bogus one and brought about purely for the purpose of depriving the defendant to enjoy his share in the joint family properties. (c) It is also the case of the defendant that there was oral partition emerged among the second plaintiff-Ananppan and his two sons, namely, Sivakumar (husband of P1) and Vijayakumar (defendant), in which, the immovable property described in the schedule of the plaint and also other movable properties were divided into two halves and one half was allotted to the defendant and

another half was allotted to Sivakumar(husband of the first plaintiff) and the movable properties were allotted to the father(Anaiappan). Accordingly, the defendant would pray for dismissal of the suit. (v)Whereupon issues were framed by the trial Court. Up went the trial, during which, the first plaintiff examined herself as P.W.1 along with P.W.2 and marked Exs.A1 to A10 marked. The defendant examined himself as D.W.1 along with D.Ws.2 and 3 and Exs.B1 to B6 were marked on his side. (vi)Ultimately, the trial Court dismissed the suit, as against which, the appeal was filed for nothing but to be dismissed by the first appellate Court, confirming the judgement and decree of the trial Court. 4.Being aggrieved by and dissatisfied with the judgments and decrees of both the Courts below, this second appeal has been focussed by the plaintiffs on various grounds and also suggesting the following substantial questions of law: "(i)Whether the in law the Courts below were right in overlooking that the karta of the family had every right to sell even joint family properties for family necessity and that his sons had no right to question it? (ii)Whether in law the Courts below are not wrong in failing to see that the lands were purchased by the second appellant with his own funds and that the sale in favour of the first appellant was hindring on the respondent? (iii)Whether in law the Courts below are right in failing to mould the relief by granting a decree for the admitted undivided 2/3rd share of the appellants in the suit lands? (extracted as such) 5.On hearing both sides, I decided to frame the following substantial questions of law: (1) Whether the first appellate Court was justified in giving a finding that there was oral partition, under which the immovable properties were allotted equally between the defendant and P1's husband-Sivakumar and the movable properties were given to Anaiappan-P2-the father? And whether such a finding was absolutely necessary for the disposal of the appeal, even though there was no issue framed by the trial Court or by the appellate Court relating to the said oral partition? (2)Whether there is any perversity or illegality in the judgments and decrees of both the Courts below? 6.Heard both. 7.The learned Senior counsel for the appellants/plaintiff would pyramid her arguments, which could succinctly and precisely be set out thus: (i)The first appellate Court, in the absence of an issue framed by the trial Court, simply went to the extent of giving a finding as though there was an oral partition, under which, certain extent of immovable properties were given to the defendant

and that the father was given only the movable properties etc., and those findings are not at all necessary for the disposal of the appeal. (ii) The said finding is allowed to remain as such, then certainly it would affect the rights of the plaintiffs to seek appropriate different relief by instituting fresh proceedings. 8. Whereupon, the learned counsel for the respondent/defendant would submit that the first appellate Court correctly and appositely, appropriately and legally, placing reliance on the evidence of D.Ws. 1 to 3 believed their evidence relating to oral partition and accordingly gave a finding, which cannot be found fault with.

9. At this juncture I recollect the following maxim: 'In re dubia magis infitatio quam affirmatio intelligenda' In a doubtful matter, the negation is to be understood rather than the affirmation. When evidence is lacking and is sketchy and patchy in a case, only the negative could be presumed and not the affirmative. Accordingly, the burden of proof is on the plaintiffs to prove the case.

10. I also recollect the like to recollect the following maxims: (i) Affirmatis est probare He who affirms must prove. (ii) Affirmanti, non neganti incumbit probatio The burden of proof lies upon him who affirms, not upon one who denies. 11. It is the duty of the person who affirms a particular fact to prove it and he cannot call upon the other side to prove the negative aspect. 12. No doubt, the Courts below, including the first appellate Court, were justified in expecting the plaintiffs to prove precisely and concisely their case. The plaintiffs cannot pick holes in the case of the defendant. Both the Courts below, placing reliance on the evidence adduced, held that the suit properties should be construed only as the joint family properties in view of the fact that P2-Anaiappan sold the ancestral properties on his behalf and on behalf of his the then minor sons, namely, Sivakumar-the husband of the first plaintiff and the defendant-Vijayakumar and from out of that sale proceeds, he purchased the suit properties vide sale deeds Ex.A1 dated 29.4.1979 and Ex.A2-dated 15.7.1980 13. It is ex facie and prima facie clear that P2-Anaippan in all probabilities must have purchased the suit properties with the help of the sale proceeds which he obtained by selling the ancestral properties, on his behalf and on behalf of his the then minor sons, because, the suit properties were purchased, vide sale Deeds Ex.A1 dated 29.4.1979 and Ex.A2 dated 15.7.1980, hardly six days after the selling of the ancestral properties as per Ex.B1 dated 23.4.1979, the

sale deed-Ex.A1 dated 29.4.1979 emerged. Even though the sale deeds Exs.A1 and A2 are standing in the name of the father-Anaiappan, still it has to be construed only as the joint family properties. 14.No doubt, the sale consideration contemplated under Ex.B1 was only Rs.9000/-, whereas, the sale consideration contemplated under Ex.B2(Ex.A1) was Rs.19,000/-. Even for arguments sake it is taken that the sale considerations for purchasing the suit properties, were cumulatively more than double that of the sale consideration, which Anaiappan obtained by selling the ancestral properties, as per Ex.B1, still the concept 'blending' would come into operation. Anaiappan being the 'kartha' of the family and that too, when he purchased the suit properties from out of the sale consideration which he derived from the sale of the ancestral properties, the suit properties should be construed only as the joint family properties and to that effect both the Courts below in unison correctly and legally decided the lis. On deciding so, as a sequela, it has to be construed that the first plaintiff cannot, based on the sale deed-Ex.A3 in her favour, claim absolute right over the suit properties. Ultimately her prayer for injunction also should be dismissed. With that, the Courts below should have stopped their finding. 15.There is no counter claim filed on behalf of the defendant for declaring that there was oral partition and that a specific extent of property was allotted in his favour etc. Even in the written statement there is no specificity about the area which was allotted in his favour under the alleged oral partition. In paragraph No.6 of the written statement, generally the defendant would plead as though there was oral partition during June 2003 and in that the immovable properties, including the suit properties, were divided into two halves and one half was allotted in his favour, without specifying which portion was allotted to him and what was the Survey number etc. 16.The defendant also would go to the extent of pointing out that Anaiappan-P2 was not allotted with any share in the immovable properties, but he was given with only the movable properties. These are all complicate facts. The laws concerning oral partition also should have been applied strictly before giving a specific finding on oral partition. 17.From the perusal of the judgement of the first appellate, what I could understand is that, it has not gone into those details, but simply believed the versions of D.W.1 to D.W.3 and held as though there was oral partition, which warrants interference. By way of disambiguating the ambiguity, if any, I would

make it clear that while I am expunging and setting aside such finding of the first appellate Court concerning oral partition, I do not either say that there was no oral partition or there was oral partition and that point is left open to be decided in the appropriate proceedings that might be initiated by either of the parties.

18. Accordingly, the substantial question of law is answered as under: Substantial question of law (1) is answered to the effect that the first appellate Court was not justified in giving a finding that there was oral partition, whereby the immovable properties were allotted equally between the defendant and P1's husband- Sivakumar and the movable properties were given to Anaiappan-P2-the father, and such a finding was not necessary for the disposal of the first appeal at all. Substantial question of law No.(2) is answered to the effect that except to the aforesaid extent indicated supra under substantial question of law No.(1), there is perversity and illegality in the judgments and decrees of both the Courts below.

19. In the result, I am of the considered view that the second appeal has to be allowed partly to the extent of expunging the finding of the first appellate Court relating to the oral partition. However, there is no order as to costs. Consequently, connected miscellaneous petition is closed. Msk 14.3.2013 To 1. the Principal District Court, Villupuram, 2. the Principal District Munsif, Ulundurpet

G.RAJASURIA, J.

msk S.A.No.1170 o

14. 3.2013

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com