

(2011) 03 MAD CK 0259

In the Madras High Court

Case No : S.A. No. 851 of 2008 and M.P. No. 1 of 2008 and 1 of 2009

Govindaraj

APPELLANT

Vs

Ramadoss

RESPONDENT

Date of Decision : 10-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31, Order 41 Rule 33, 100
Evidence Act, 1872 — Section 68, 69, 70, 90
Land Acquisition Act, 1894 — Section 30, 31
Succession Act, 1925 — Section 63

Citation : (2011) 3 CTC 433 : (2011) 2 LW 831 : (2011) 7 MLJ 1132

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : M.S. Subramaniam, for the Appellant; N. Nagusah, for the Respondent

Judgement

G. Rajasuria, J.—This second appeal is focused by the Defendant, animadverting upon the judgment and decree dated 12.04.2007 passed

by the learned Subordinate Judge, Madurantakam in A.S. No. 49 of 2006 confirming the judgment and decree dated 25.08.2004 passed by the

learned District Munsif, Madurantakam in O.S. No. 123 of 1997.

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

3. A summation and summarisation of the relevant facts absolutely necessary and germane for the disposal of this Second Appeal would run thus:

a] The Plaintiff filed the suit seeking the following reliefs:

- to pass a preliminary decree for partition by dividing the suit properties into two equal shares and allotment of one such share by metes and

bounds and for separate possession.

- to direct the Defendant to pay mesne profits till the date of separate possession.
- to direct the Defendant to pay the cost of the suit to Plaintiff.

(extracted as such)

b] Written statement was filed by the Defendant resisting the suit. Whereupon reply was filed by the Plaintiff and additional written statement was

filed by the Defendant.

c] Whereupon issues were framed. On the side of the Plaintiff, he examined himself as P.W.1 and marked Exs.A1 and A2. The

Defendant/Govindarajan examined himself as D.W.1 along with D. Ws.2 and 3 and marked Exs.B1 to B7.

d] Ultimately the trial court rejected the prayer for partition in respect of items Nos. 1 to 3 of Schedule I of the suit properties and in the remaining

items of Schedule I and Schedule II and III, the Plaintiff and the Defendant were allotted half share each.

e] Being aggrieved by and dissatisfied with the said judgment and the preliminary decree, the Defendant preferred appeal for nothing but to be

dismissed confirming the judgment and preliminary decree of the trial court.

4. Challenging and impugning the Judgments and decrees of both the Courts below, this Second Appeal has been filed by the Defendant on

various grounds, suggesting the following substantial questions of law.

1. Whether the presumption u/s 90 of the Indian Evidence Act is applicable to Exhibit B4, the Will dated 11.06.1954?

2. If the presumption u/s 90 of the Indian Evidence Act is applicable to the Will dated 11.06.1954, when a rejoinder is filed and the said Will is not

denied in the rejoinder, is propounder of the Will required to prove the Will u/s 68 of the Indian Evidence Act?

(extracted as such)

5. My learned predecessor while admitting the second appeal, adapted virtually the same, aforesaid substantial questions of law for consideration

in this second appeal.

6. After hearing both sides, I am of the view that two other substantial questions of law have to be framed and accordingly it is framed as under:

3. Whether both the courts below were justified in rejecting the share of the Plaintiff in item Nos. 1 to 3 of Schedule I of the suit properties on the

only ground that the Plaintiff claimed those properties also for partition, that he is the legal heir of Varada Gounder and not as the legal heir of

deceased Varada Gounder's deceased daughters, viz., Kuppammal and Vaduvambal and whether by invoking Order 41 Rule 33 of CPC, the

error if any committed by the courts below can be rectified as it is being a partition suit, even though separately no appeal was filed by the Plaintiff?

4. Whether there is any perversity or illegality in the judgments and decrees of both the courts below?

Point Nos. 1 and 2:

7. The learned Counsel for the Defendant would advance his argument, which could pithily and precisely be set out thus:

i) Section 90 of the Indian Evidence Act is wide enough to include within its ambit, even the Will of 30 years old and no exception can be carved

out of it.

ii) Section 90 of the Indian Evidence Act comes under the caption ""Presumption as to documents"", which are exception to normal rules

contemplated in earlier sections respecting proving of documents. Hence, in such a case, from the exceptions, no exception could be carved out.

Accordingly, Section 90 of the Indian Evidence Act, if applied to Ex.B4 the Will dated 11.06.1954, then it cannot be challenged on the ground

that it was not proved in accordance with Section 68 and 69 of the Indian Evidence Act.

iii) As per the Will Ex.B4, the testator Varatha Gounder executed the Will in favour of his youngest daughter viz., Vaduvambal, who in turn,

executed the Will Ex.B6 dated 23.06.1993 in favour of the Defendant and in such a case, both the courts below were wrong in understanding the

factual scenario in proper perspective and deciding the lis.

iv) The trial court rejected the prayer for partition in respect of item Nos. 1 to 3 of Schedule I of the suit properties, as against which, no appeal

was filed by the Plaintiff and the first appellate court also simply dismissed the appeal filed by the Defendant.

v) Whereupon, this second appeal emerged at the instance of the Defendant; wherein, the Plaintiff who all along kept quiet, cannot try to get

invoked Order 41 Rule 33 of CPC and deprive the Defendant of his right over item Nos. 1 to 3 of Schedule I of the suit properties.

Accordingly, the learned Counsel for the Defendant prays for setting aside the judgments and decrees of both the courts below.

8. Whereas in a bid to torpedo and pulverise the arguments as put forth and set forth by the learned Counsel for the Defendant, the learned

Counsel for the Plaintiff would advance his argument, the pith and marrow of them would run thus:

a] Section 90 of the Indian Evidence Act cannot be pressed into service in respect of the Will of 30 years old and as such, the earlier decisions

governing the field got changed and as of now, the precedents are to the effect that Section 90 of the Indian Evidence Act is not applicable in

respect of even Wills of 30 years old and the propounder of the Will or the person placing reliance on the Will, should prove the same, without any

exception, strictly in accordance with Section 68 and 69 of the Indian Evidence Act.

b] This is a partition suit and both the courts below fell into error in construing that the Plaintiff and the Defendant are only the heirs of Varadha

Gounder and that therefore they were not entitled to the items 1 to 3 of Schedule I which stand with the name of the daughters of Varadha

Gounder. Consequent upon the death of Kuppammal and Vaduvambal, their father's heirs alone would be the legal heirs as per the Hindu

Succession Act and there could be no second thought over it and in such a case, the Plaintiff and the Defendant would be entitled to half share

each in the said item Nos. 1 to 3 of Schedule I of the suit properties also and both the courts below misdirected themselves by misinterpreting the

pleadings as though the Plaintiff claimed right only under Varadha Gounder and not as the legal heirs of deceased persons, viz., Kuppammal and

Vaduvambal. As such, the High Court while exercising its power u/s 100 of CPC, whenever comes across any perversity or illegality in the

decisions rendered, it could rightly rectify the same.

Accordingly, the learned Counsel for the Plaintiff would pray for dismissal of the prayer of the Defendant in the second appeal. However, he would

pray for modifying the judgment and decrees of both the courts below so as to include even item Nos. 1 to 3 of Schedule I of the suit properties, in

the partition decree.

9. I would like to fumigate my mind with the recent decision of the Hon'ble Apex

Court reported in Vijay Kumar Talwar Vs. Commissioner of Income Tax, Delhi, , certain excerpts from it would run thus:

19. It is manifest from a bare reading of the section that an appeal to the High Court from a decision of the Tribunal lies only when a substantial question of law is involved, and where the High Court comes to the conclusion that a substantial question of law arises from the said order, it is mandatory that such question(s) must be formulated. The expression ""substantial question of law"" is not defined in the act. Nevertheless, it has acquired a definite connotation through various judicial pronouncements.

23. A finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread.

The Hon''ble Apex Court in the aforesaid precedent highlighted and spotlighted the fact that unless there is any substantial question of law is involved in the matter, the question of entertaining the second appeal would not arise.

10. In this case, certainly the serious question of law pertaining to application of Section 90 of the Indian Evidence Act relating to Will of 30 years old is involved and furthermore, the application of Order 41 Rule 33 of CPC also in the facts and circumstances of this case is involved.

11. Indubitably and indisputably, unassailably and incontrovertibly, the relevant facts would run thus:

One Varada Gounder had four daughters, viz., Ellammal, Kuppammal, Kamalakshmi Ammal and Vaduvambal. The Plaintiff is the son of Kamalakshmi Ammal and the Defendant is the son of Ellammal. The other two daughters viz., Kuppammal and Vaduvambal died issueless and their respective husbands also pre-deceased them. The suit properties, except item Nos. 1 to 3 in the I Schedule did belong to Varada Gounder over which, there is no controversy. However, item No. 1 of Schedule I of the suit properties was purchased by Kuppammal and item Nos. 2 and 3 are stated to have been purchased by Vaduvambal. However, they died issueless and their husbands also pre-deceased them and as such, it is

not in dispute that the Plaintiff and Defendant being the sisters' sons of Vaduvambal are the legal heirs of them.

12. The contention of the Defendant is that Section 90 of the Indian Evidence Act is squarely applicable in respect of Ex.B4, the Will dated

11.06.1954 purported to have been executed by Varada Gounder. Ungainsayably, no evidence to prove the Will Ex.B4 was adduced on the ground that the attesting witnesses were not available.

13. The learned Counsel for the Defendant would cite the following decisions:

1. Brij Mohan Lal Arora and Others Vs. Girdhari Lal Manocha,

2. 2000 AIHC 2210 [Acho Dominic alias Reenku and Ors. v. Xavier and others]

Placing reliance on those decisions, the learned Counsel for the Defendant would submit that the long line of precedents would be to the effect that

Section 90 of the Indian Evidence Act does apply to Will of 30 years old and even the testator's capacity to execute the Will and other

circumstances relating to the genuineness of the Will also should be proved for the reason that intestacy cannot be presumed but testacy has to be

encouraged. However, the learned Counsel for the Plaintiff would submit that despite Section 90 of the Indian Evidence Act, the Will Ex.B4 was

expected to be proved strictly in accordance with Section 68 and 69 of the Indian Evidence Act and according to him even if the attesting

witnesses were not alive, then endeavours should have been made by the propounder of the Will or the Defendant who is placing reliance on the

Will to secure the presence of the witnesses who could speak about the genuineness of at least one of the attestors as well as the genuineness of

the signature of the testator; but that was not done so.

14. At this juncture, I would like to point out that the latest and the recent decision of the Hon'ble Apex court reported in Bharpur Singh and

Others Vs. Shamsher Singh, should necessarily be adhered to as under: Certain excerpts from it would run thus:

19. The provisions of Section 90 of the Evidence Act, 1872 keeping in view the nature of proof required for proving a Will have no application. A

will must be proved in terms of the provisions of Section 63(c) of the Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. In

the event of the provisions thereof cannot be complied with, the other provisions contained therein, namely, Sections 69 and 70 of the Evidence

Act providing for exceptions in relating thereto would be attracted. Compliance with statutory requirements for proving an ordinary document is

not sufficient, as Section 68 of the Evidence Act postulates that execution must be proved by at least one of the attesting witnesses, if an attesting

witness is alive and subject to the process of the court and capable of giving evidence.

It is therefore crystal clear from the decision of the Hon'ble Apex Court that Section 90 of the Indian Evidence Act is not applicable relating to

proving of the Will is concerned; even though the Will like Ex.B4 might be of 30 years old and produced from proper custody, yet strictly in

accordance with Section 68 and 69 of the Indian Evidence Act, the Will Should be proved.

15. Following the aforesaid judgment of the Hon'ble Apex Court, this Court in the decision reported in 2010 (2) L.W.637 [Srirangam Co-

operative Building Society by its Special Officer R. Rajagopalan Ammamandapam Road, Srirangam and 11 Ors. v. T.N. Muniswami Konar and

Ors.] has held thus:

25. A perusal of Ex.A5, the death extract would reveal that the place of death is shown as Government T.B. Hospital, Royapettah, Madras and

the cause of death is pulmonary Tuberculosis and the duration of ill-ness is nine months. In Ex.A4, Will, though it is registered, the said Saraswathi

Bai has not signed but has made "X" mark. One Rajaraman and Arumugam Chettiar were shown as attesting witnesses. There is no evidence show

that who has presented the Will for registration. Though there is left thumb impression available in the document, the address of the executant is

also shown as No. 14, Muthiah Mudali Street, Vannarpet, Madras. In the LAOP proceedings, one of the claimant is shown as Krishnalala and his

whereabouts not known. A reference was made under Sections 30 and 31(2) of the Land Acquisition Act to decide, who is entitled to receive the

compensation. From the records, it is made clear that a notice was issued to the Trustees of the Trust/madam and it was not made clear that a

notice was issued to the Trustees of the Trust/Madam and it was not made clear whether the Trust staked any claim under the Will. However, the

Court has declared that the second claimant is entitled to receive the compensation amount, by order dated 07.03.1954.

26. Therefore, the trial court is wrong in drawing presumption that the Will dated 04.02.1949 is 30 years old and genuine. The Will has to be

proved as required under law and the same has not been proved. There is also no evidence to show that a Trust has been created and in existence.

As far as the temple, viz., Anjaneyar Temple, is concerned, even according to the second Defendants, they have not alienated the temple and the

surrounding vacant site in ""A"" Schedule property, but, in a part of ""A"" Schedule Property, the second Defendant, viz., Srirangam Co-operative

Building Society, has put up a construction of their office. Whether the Plaintiff is in possession and enjoyment of the temple and the surrounding

vacant site is not proved before the trial court.

As such, this Court is enjoined to follow the decision of the Hon''ble Apex court and also the decision of this Court, which followed the decision of

the Hon''ble Apex Court.

16. No doubt, the learned Counsel for the Defendant faintly in order to get over those two precedents, referring to the decision of the Privy

Council reported in 1946 (2) MLJ 453 would submit that the said decision was not found referred to in the decision of the Hon''ble Apex Court,

for which what I would like to observe is that even obiter of Hon''ble Apex Court would constitute a binding precedent and it cannot be bye-

passed.

17. The learned Counsel for the Plaintiff would very much rely on the decision of the Hon''ble Apex Court decision reported in Bharpur Singh and

Others Vs. Shamsheer Singh, .

18. Hence, I am of the considered view that the substantial questions of law No. 1 and 2 are decided to the effect that Ex.B4 Will was not proved

in accordance with law and the presumption u/s 90 of the Indian Evidence Act was not attracted to it and hence, it cannot be relied upon by the

Defendant.

19. Accordingly, these two points are decided in favour of the Plaintiff and as against the Defendant.

Point Nos. 3 and 4:

20. The learned Counsel for the Defendant would submit that since the Plaintiff did not file any appeal or cross appeal as against the non-granting

of relief in his favour relating to item Nos. 1 to 3 of Schedule I of the suit properties, it would not be open for him now to seek for modifying the preliminary decree of the trial court so as to include the item Nos. 1 to 3 of Schedule I of the suit property also for partition on the ground that both the courts below committed error in not recognizing the Plaintiff and the Defendant as the sole legal heirs of the two deceased daughters viz., Kuppammal and Vaduvambal through the deceased Varadha Gounder.

21. In this connection, I would like to cite the following decision of the Hon'ble Apex Court reported in 2010(7) SCC 717 [Laxman Tatyaba

Kankate and Anr. v. Taramati Harishchandra Dhatrak]. An excerpt from it would run thus:

24. It is a settled principle of law that before the first appellate court, the party may be able to support the decree but cannot challenge the findings without filing the cross-objections....

No doubt, a plain reading of that precedent would connote and denote that without filing any cross appeal, the findings of the lower court cannot be challenged before the higher forum. However, there are certain exceptions recognised by the Hon'ble Apex Court itself to consider certain facts under Order 41 Rule 33 of CPC.

22. This is a partition suit. It cannot be denied that there should not be any piecemeal partition and the court also should see to it that multiplicity of proceedings are protected. I recollect and call up the maxims:

1. Boni judicis est ampliare jurisdictionem - It is the part of a good judge to enlarge (or use liberally) his remedial authority or jurisdiction.

2. Boni judicis est ampliare justitiam - It is the duty of a good judge to enlarge or extend justice.

3. Boni judicis est lites diremere, ne lis ex lite oritur, et interest rei publicae ut sint fines litium. It is the duty of a good judge to prevent litigations, that suit may not grow out of suit, and it concerns the welfare of a state that an end be put to litigation.

All these three maxims would unambiguously and unequivocally highlight and spotlight the fact that a Judge is expected to decide the lis finally

without paving the way for off shoot litigation thereafter. As such, in the interest of justice, necessarily interference in the judgments and decrees of

both the courts below is warranted by invoking Order 41 Rule 33 of CPC.

23. This is a fit case, wherein, such power has to be invoked because from the available facts, both the courts below failed to grant relief

appropriately and legally in respect of item Nos. 1 to 3 of Schedule I of the suit properties. It cannot be gain said that the Plaintiff and the

Defendant are the only legal heirs of Varada Gounder and for Varada Gounder's deceased daughters, viz., Kuppammal and Vaduvambal, who

died issue less, only Varada Gounder's heirs would be the legal heirs, in which case, in respect of item Nos. 1 to 3 of Schedule I of the suit

properties also, the Plaintiff and the Defendant are the legal heirs and both the courts should have included those items also for partition, which they

owing to misconception failed to do so. It is also not the case of the Defendant that he is having any exclusive right over those three items of the

Schedule I of the suit properties under any other capacity. He placed reliance on Ex.B6- Will, which was turned down and rejected by both the

courts below and as against which, no substantial question of law also has arisen.

24. The Defendant claimed right over item Nos. 1 to 3 of the Schedule I of the suit properties only under Vaduvambal's Will Ex.B6, which was

rejected by both the courts below, after analysing the facts and figures, relating to it. The suspicious circumstances also were highlighted by both

the courts below and held that Vaduvambal could not have executed the Will Ex.B6 genuinely.

25. The learned Counsel for the Plaintiff drew the attention of this Court to the following portion of the Will Ex. B6 Vernacular (Tamil) Portion

Deleted for which, the learned Counsel for the Defendant in all fairness would agree to the factual position that Vaduvambal's husband died even

in the year 17.08.1984 as revealed from the written statement of the Defendant himself and in such a case, the aforesaid recital in Ex.B6 should not

have arisen and that itself is indicative of the fact that all is not well with the said Ex.B6 and both the courts below appropriately and correctly

rejected the genuineness of Ex.B6, warranting no interference in the second appeal. The item Nos. 1 to 3 of Schedule I of the suit properties,

undoubtedly devolved upon the Plaintiff and Defendant equally.

26. Accordingly, the substantial question of law Nos. 3 and 4 are decided to the effect that both the courts below were not justified in rejecting the

share of the Plaintiff in item Nos. 1 to 3 of Schedule I of the suit properties on

the only ground that the Plaintiff claimed those properties also for partition that he is the legal heir of Varada Gounder and not as the legal heir of deceased Varada Gounder's deceased daughters, viz., Kuppammal and Vaduvambal. This is an appropriate case where Order 41 Rule 31 of CPC is bound to be invoked and accordingly invoked.

27. In the result, while allowing the second appeal in part, the preliminary decree passed by both the courts below is modified to the effect that

item Nos. 1 to 3 of Schedule I of the suit properties also should be included in the partition at the same rate of half share each in favour of the

Plaintiff and the Defendant.

28. Accordingly, the second appeal is disposed of. However, there shall be no order as to costs. Consequently, the connected miscellaneous

petitions are closed.