

(2011) 03 MAD CK 0258

In the Madras High Court

Case No : S.A. No. 180 of 2011 and M.P. No. 1 of 2011

Krishnan, Kamala and Seerangammal

APPELLANT

Vs

Lakshmipathi and Bakkiam

RESPONDENT

Date of Decision : 18-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Hindu Succession Act, 1956 — Section 29A

Citation : (2011) 03 MAD CK 0258

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : G. Jermiah, for the Appellant; R. Subramanian, for the Respondent

Judgement

G. Rajasuria, J.—This second appeal is filed by the D1 and P2, inveighing the judgment and decree dated 28.4.2009 passed by the

Subordinate Judge, Mettur, in A.S. No. 48 of 2008 confirming the judgment and decree dated 1.7.2008 passed by the District Munsif, Mettur, in

I.A. No. 821 of 2003 in O.S. No. 468 of 1996.

2. The parties, for the sake of convenience, 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:

(i) The second Appellant and the first Respondent herein, as Plaintiffs, filed the suit for partition and possession as against the three Defendants.

Whereupon preliminary decree was passed by the trial Court, allotting 1/5th share in favour of each one of the parties.

(ii) After preliminary decree, indubitably and indisputably and unassailably and ungainsayably D1 purchased the shares of second Plaintiff, D2 and

D3 and acquired totally 4/5th shares in his favour and the first Plaintiff is entitled to 1/5th share, over which there is no dispute.

(iii) The suit properties comprised of two items. Regarding the first item is concerned, there is no controversy and both sides in unison would

submit that the matter relating to it was finalized.

(iv) Only in respect of the second item, which is a house, there is dispute raised by D1 to the effect that since he acquired 4/5th shares in that house

and that the first Plaintiff is entitled to 1/5th share, D1 is entitled to the entire house and the final decree passed was not in accordance with law.

4. I would like to narrate hereunder as to what happened in the litigative process. After the preliminary decree was passed, the first Defendant

preferred the first appeal. During the pendency of the appeal itself, E.P. was filed by the first Plaintiff and at that time, application u/s 47 of C.P.C.

was filed by the first Defendant as though the final decree was an in executable one, because, it was a defective one.

5. Whereupon order was passed by the Executing Court, as against which C.R.P. was filed for nothing but to be dismissed. The first appeal

preferred as against the final decree also was dismissed and as against which, this second appeal has been filed by D1 on various grounds and also

suggesting the following substantial questions of law:

a) Whether the trial Court has passed a proper final decree based on the subsequent events of relinquishment of their shares over the suit

properties by me. Appellant 2 and 3 and the 2nd Respondent in favour of the 1st Appellant herein?

b) Whether the Courts below correct in passing the final decree based on the Commissioner's report filed prior to the relinquishment of the share

by the Appellants 2 and 3 and 2nd Respondent in favour of the 1st Appellant?

c) Whether the Clause (5) of the final decree is executable by directing the 1st Respondent herein to close the entrance on the Northern side and

put up new entrance on the Western side of the (c) portion of the Commissioner report when admittedly the 1st Appellant herein is in possession

and enjoyment of the item 2 of the suit property?

d) Whether the Courts below erred in not granting a decree for delivery of allotment of 1/5th share to the 1st Respondent herein?

e) Whether the final decree as such granted and confirmed by the lower

appellate Court is entitled to execute the same for delivery of 1/5th share to the 1st Respondent in the absence of relief of delivery of possession?

f) Whether the Courts below erred in not granting proper decree for possession of 1/5th share to the 1st Respondent herein when the preliminary decree wrongly drawn for the relief of possession of 2/5th shares?

(extracted as such)

6. Placing reliance on the grounds, as found set out in the memorandum of second appeal, the learned Counsel for the first Defendant would

advance his argument that the Courts below failed to take into account the fact that the larger share holder, namely, D1, who is entitled to 4/5th

shares in the suit house, is also entitled to the remaining 1/5th share allotted to the first Plaintiff and the Courts below should have considered this

and allotted the entire suit house in favour of D1.

7. Per contra, in an attempt to torpedo and pulverise the argument as put forth and set forth on the side of D1, the learned Counsel for the first

Plaintiff would submit that absolutely there is no merit in the second appeal and no question of law much less substantial question of law is involved

and that too, in view of the fact that the contentions raised by D1 in his application u/s 47 of C.P.C. was rejected by the Executing Court as well as

by this Court in C.R.P. and as such that would also operate as res-judicata as against the Appellants' contentions in this second appeal.

8. Be that as it may, considering the pro et contra, I am of the view that first of all this Court has to see as to whether there is any substantial

question of law is involved.

9. At the outset itself I would like to fumigate my mind with the following decisions of the Honorable Apex Court:

(i) 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.

22. In *Hero Vinoth v. Seshammal*, this Court has observed that: (SCC p.556, para 24)

(iii) The general rule is that the High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of

the well-recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn

wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to

"decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the

evidence, taken as a whole, is not reasonably capable of supporting the finding.

(ii) *Hero Vinoth (minor) Vs. Seshammal*, ;

(iii) *Kashmir Singh Vs. Harnam Singh and Another*, .

(iv) 2009 1 L.W. 1 " *State Bank Of India and Ors. v. S.N. Goya*:

10. A bare perusal of the above precedents would exemplify and demonstrate that unless there is any perversity or illegality in the decisions

rendered by the Courts below, the question of interfering in second appeal on findings of fact would not arise and there should be valid legal

grounds also for interference.

11. I would like to point out that no application under the Partition Act, 1893 was filed and in such a case, it would not be open for D1 to contend

that at the time of passing final decree, the entire house should have been allotted in his favour, on the ground that he happened to be the major

share holder, so to say, to an extent of 4/5 shares in the suit house. According to the learned Counsel for D1, the first Plaintiff is now allotted only

an extent of 7 feet X 5 = feet marked as "C" portion in the house, as found described and depicted in the Commissioner's sketch and that would

not be beneficial to the first Plaintiff also, but on the other hand, if such small portion is given to D1 then it would be beneficial to him. He would

also proceed to contend that a additional preliminary decree should have been passed, consequent upon the subsequent sales effected in favour of

D1 by the other three share holders.

12. At this juncture I recollect and call up the following maxims:

(i) *Nul prendra advantage de son tort demesne* " No one shall take advantage of his own wrong.

(ii) *Nemo allegans suam turpitudinem audiendus est* "

No one alleging his own turpitude is to be heard as a witness.

(iii) *Nullus commodum capere potest de injuria sua propria* " No one can obtain an advantage by his own wrong.

13. The learned Counsel for D1 also would cite the judgment of the Division Bench of this Court reported in 1993 2 L.W. 72 " M. Shanmugha

Udayar V. Sivanandam And 8 Others, certain excerpts from it would run thus:

34. ...Ordinarily, the decree in a suit should accord with the rights of both the parties as they stand at the date of its institution. But this principle is

not of universal application. Where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become

inappropriate or that it is necessary, to base the decision of the Court on the later circumstances in order to shorten litigation or to do complete

justice between the parties, it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and

to mould its decree according to the circumstances as they stand at the time the decree is made. And the Apex Court has laid down in *Phool*

Chand v. Gopal Lal 1967 (2) S.C.R. 153 that so far as partition suits are concerned, if an event happens after the preliminary decree and before a

final decree is passed, and a change in the shares is necessitated, the trial Court can and should pass a second preliminary decree correcting the

shares; and, if there is a dispute in that behalf, the order of the Court deciding that dispute and making a variation in the shares specified in the

preliminary decree already passed is a decree in itself which would be liable to appeal. A partition suit is not finally disposed of till the final decree

is passed and the Court has jurisdiction to decide all disputes, that may arise due to the death of some of the parties after the preliminary decree

and before the passing of the final decree. There is nothing in the CPC which prohibits the passing of more than one preliminary decree in a

partition suit, if circumstances justify it and if it is convenient and advantageous to do so. So there cannot be any impediment in passing another

preliminary decree correcting the shares in case we find that the 10th Defendant also has to be allotted a share in the division of family assets.

14. The said decision is distinguishable from the one involved in this case. There, the validity of the Will executed was considered as per Section

29A of the Hindu Succession Act. But here, absolutely there is no quarrel over such alienation of shares by the two Defendants and the second

Plaintiff in favour of D1 and in such a case, insisting on the plea that there should have been additional preliminary decree is neither here nor there

and any argument on that line would amount to shooting oneself in his foot. As such, that cannot be countenanced at the second appellate stage.

Not to put too fine a point on it, without filing any application under the Partition Act, the question of D1 trying to purchase the property of the first

Plaintiff also would not arise.

15. The learned Counsel for D1 would also invite the attention of this Court to Clause (5) of the final decree and contend that the lower Court was

not justified in mandating that the already existing threshold to "C" portion should be closed and the fresh threshold should be opened facing West

abutting the common pathway.

16. The learned Counsel for the first Plaintiff would convincingly and correctly, appropriately and appositely put forth his argument that such relief

as in Clause (5) of the final decree is only for the benefit of D1, who is having 4/5th share in the property. By effecting such closure of the old

opening to "C" portion and making a new opening in "C" portion abutting the common passage, only D1 would be benefited as without disturbing

D1's enjoyment of the 4/5th share, the first Plaintiff would be enjoying the "C" portion.

17. As an utmost submission, the learned Counsel for D1 would raise a question as to what the first Plaintiff is going to make use of that small "C

portion, for which, the learned Counsel for D1 would submit that the first Plaintiff is an old lady and out of sentiment for the ancestral property, she

wants to retain it.

18. In view of the above circumstances, I am of the view that there is no question of law much less substantial question of law is involved in this

second appeal. Accordingly, it is dismissed. However, there is no order as to costs. Consequently, connected miscellaneous petition is dismissed.

19. Learned Counsel for D1 would make an extempore submission to the effect that in the process of closing the existing threshold to "C" portion

facing North and opening a new threshold facing West, some problem between the parties might arise; and hence this Court may direct that only in

the presence of Court appointed Commissioner such process should be carried out, for which the learned Counsel for the first Plaintiff has no

objection.

20. Accordingly, it is ordered that the execution shall be carried out preferably in the presence of the same advocate commissioner, who submitted

his report during the final decree proceedings or some other Advocate Commissioner to be appointed suo motu by the Executing Court in the

pending E.P at the cost of both.