

(2009) 01 MAD CK 0282
In the Madras High Court
Case No : S.A. No. 1110 of 2008

M.K.A.K. Bowsiya Begum

APPELLANT

Vs

Mariam Beevi and M.K.A.K. Salka Beevi

RESPONDENT

Date of Decision : 22-01-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 14

Citation : (2009) 01 MAD CK 0282

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : P. Subamaniam, for the Appellant; S. Natarajan, for the Respondent

Final Decision : Dismissed

Judgement

S. Rajeswaran, J.—The 1st defendant in O.S. No. 8 of 2005 is the appellant before this Court. The suit was filed by the 1st respondent /plaintiff in O.S. No. 8 of 2005 before the Subordinate Judge, Aruppukottai for partition and separate possession of 1/3rd share of the suit property with costs.

2. The case of the plaintiff is that the suit properties belonged to her late father Kathar Mohideen. Plaintiff's father Kathar Mohideen died in the year 1990 and his wife Chaithoon Beevi, the mother of the plaintiff, died in the year 1995. The defendants are the sisters of the plaintiff. Another sister by name Mukamadha Beevi predeceased the parents. At the time of their father's death only the plaintiff and the defendants are the surviving legal heirs. After the death of the father, the suit properties are to be divided between the plaintiff and the defendants as per the Mohammadan law. The properties have been in common enjoyment of the plaintiff and the defendants. The plaintiff has not been residing in the village where the suit properties are situated. Taking advantage of her absence, the defendants created false documents as if there was a partition among themselves and without giving any share to the plaintiff in the entire properties during December 2004. The plaintiff has not signed any deed much less partition deed. Only by creating false and forged documents, the defendants

wanted to take over the property of the plaintiff. On 15.12.2004, the plaintiff sent a notice through courier demanding her share. Though the notice was received by the defendants, no reply was sent by them. A copy of the notices was also sent to the Head of the Islam Community and also the husband of the deceased sister Mukamadha Beevi. As per Mohammadan law, Mukamadha Beevi is not entitled to any share as predeceased their father. Both of them returned the notice. Hence, the plaintiff filed the suit for the aforesaid relief.

3. A written statement has been filed by the 1st defendant denying the allegations made in the plaint. The 1st defendant also denied the dates of the death of the parents as mentioned in the plaint. However, she admits that the plaintiff and the defendants are the surviving legal heirs of their father. According to the 1st defendant, the deceased father in order to have an amicable settlement and to create harmony in the family, executed an effective partition on 23.5.1986 in the presence of Panchayatars. As per that document, the parties are in possession and enjoyment of the respective shares. While so, when the sister Mukamadha Beevi died, her share was also taken by the deceased father and sold the property to one Selvam in the year 1999. That property was mentioned as second schedule property. According to the 1st defendant, the plaintiff has been paying kist for the property taken by her as her share. Therefore, the suit schedule property is no longer available and the same has been divided among the surviving legal heirs as per document dated 23.5.1986. Hence, the suit is liable to be dismissed.

4. The second defendant filed a memo dated 24.11.2005 stating that she has no objection for the suit and the relief sought for by her sister as plaintiffs.

5. On the basis of the above said pleadings, the trial Court framed the following issues:

- (1) Whether there was a partition in the presence of the Panchayatars on 23.5.1986?
- (2) Whether the share of Mukamadha Beevi has been sold in the year 1995 by her husband?
- (3) Whether the partition dated 23.5.1986 has been acted upon?
- (4) Whether the suit property has been properly valued?
- (5) Whether the plaintiff is entitled to claim 1/3rd share in the suit property?
- (6) To what other relief?

6. On the basis of the evidence available, both oral and documentary, the plaintiff examined herself as PW1 and marked Exs. A1 to A3. On the side of the defendant one Nalla Mohammad the husband of the first defendant examined as DW1 and documents Exs. B1 to B5 were marked on the side of the 1st defendant. On the basis of the oral and documentary evidence, the trial court found that the alleged partition deed relied on by the first defendant is an un-

registered document and no one was examined on the side of the first defendant to prove its execution. Moreover, the plaintiff denied her signature in the said document and the contrary was not proved by the defendant. Moreover, with regard to the alleged sale of the property given under the name of Mukamadha Beevi the deceased sister, which was mentioned as second item of the suit schedule property, no document was filed in support of the same by the first defendant. Though PW1, defendant also said that even before the document dated 23.5.1986, an earlier meeting was held on 10.5.1986 and only on that basis, the subsequent document dated 23.5.1986 came into effect, that was not pleaded in the written statement nor stated in the document dated 23.5.1986. Therefore, the trial court on consideration of the evidence held that the first defendant did not establish the prior partition among the family members on 23.5.1986. Thus, the trial court rejected the case of the first defendant and decreed the suit as prayed for.

7. Aggrieved by the same, the 1st defendant filed in A.S. No. 26 of 2006 before the Principal District Court, Virudhunagar at Srivilliputhur. After re-evaluating the oral and documentary evidence, the lower appellate court held that the case has been established by the plaintiff for 1/3rd partition.

8. Aggrieved by the concurrent judgements of both the courts below, the 1st defendant has filed the above second appeal before this Court raising the following substantial questions of law:

- (1) Is not construction of a document a question of law?
- (2) Can a partition deed be construed as gift or will under Mohammeden Law?
- (3) Is not the duty of court of justice to send a disputed document to be tested by an expert?
- (4) What is the scope of Order 16, Rule 14 of Civil Procedure Code?
- (5) Is a party estopped from interpreting the document in a different manner according to law, even though the party construed it in another manner i.e. is the party's statement about the document is final?
- (6) Is not a party to a document estopped from rescinding from its term, having accepted the same?

9. This Court on 19.11.2008 posted the appeal for final disposal on 10.12.2008 and stayed the passing of final decree alone. I have heard the learned Counsel for the appellant and the learned Counsel for the first respondent. I have also gone through the documents and the judgements produced before this Court.

10. The case of the plaintiff before the trial court is that, the suit schedule properties originally belonged to her father, in which, she and her sisters, the defendants in the suit, are entitled to 1/3rd share each. Since the properties were not partitioned, she filed O.S. No. 8 of 2005 for partition and separate possession of her 1/3rd share. It is her contention that the defendants are trying

to deprive of her 1/3rd share by relying on some document which is a fabricated one and the alleged signature in that document was not her signature.

11. Whereas the second defendant accepted the case of the plaintiff and filed a memo stating that she has no objection for granting the relief as prayed for by the plaintiff.

12. The first defendants hotly contested the suit by filing a written statement. According to her, when their father, mother and another sister were very much alive, a Partition Deed was entered into by all the parties before their Community Leaders and Panchayatars on 23.5.1986 and on that basis the properties were divided among the parties. It was her further contention that the property allotted to the sister, Mohumuda Biwi, was later on sold by their father in the year 1999. Acting on the partition deed dated 23.5.1986, the first defendant also paid a sum of Rs. 10,000/- to the plaintiff and all the three sisters are in enjoyment and possession of the partitioned properties as per the Deed dated 23.5.1986 and therefore, no properties are available for partition. Thus, the main contention of the first defendant is that, the Deed dated 23.5.1986 will clinch the entire issue which was marked as Ex.B1.

13. The trial court after considering Ex.B1, found that it is in the nature of a Will which is not a Registered one. It is further considered the contention of the plaintiff that she did not sign the Deed and the failure on the part of the first defendant to prove the plaintiff's signature by examining any one of the persons who attested the Deed i.e. Ex.B1 DW1 also accepted in his cross-examination that Ex.B1 would come into operation only after the death of the parents of the plaintiff and the defendants. But, their sister, Mohumuda Biwi passed away in the year 1995, their mother in the year 1998 and their father on 17.2.2000. Therefore, when the sister pre-deceased their parents, it could not be said that the Deed came into operation as contended by the first defendant. Further, the first defendant was not able to let in any evidence to prove her contention that the property allotted to the deceased sister was already sold by their father after her death. That apart, DW1 did accept in his cross-examination that even-though Ex.B1 was signed on 23.5.1986, the eight panchayatars attested the documentary on 23.5.1986. Though it was not contended in the written statement that before executing Ex.B1 on 23.5.1986, there was a panchayat on 10.5.1986, the same was stated by DW1 in his examination. Therefore, the trial court disbelieved Ex.B1 and accepted the case of the plaintiff. Accordingly, the suit was decreed as prayed for.

14. The Lower Appellate Court after re-evaluating the evidence, especially Ex.B1, found that Ex.B1 was not at all proved because of the lacuna as pointed out by the trial court. Before the Lower Appellate Court, a contention was raised by the first defendant that instead of disbelieving the Ex.B1, opportunity should have been extended to the first defendant to prove Ex.B1 by summoning some of the panchayatars who attested that document. Therefore, the first defendant prayed for remand of the matter to the trial court for fresh consideration. But, this was

rightly disallowed by the Lower Appellate Court as it also found that Ex.B1 is not an acceptable document to prove the partition as alleged by the first defendant. Consequently, it concurred with the findings of the trial court and accordingly confirmed the trial court judgement by dismissing the appeal.

15. In the light of the above findings of both the courts below, I am of the considered view that there is no substantial question of law that arises for consideration in the Second Appeal. Both the courts below have correctly evaluated and decided Ex.B1 on the basis of the available evidence and it is not open to the appellant to re-argue the matter before this court as if this appeal is the first appeal. Though a number of substantial questions of law are raised in the memorandum, I am of the considered view that they are nothing but an attempt on the part of the appellant to re-argue the matter and to re-agitate the very same grounds before this Court.

16. Hence, I do not find any merits in the appeal and accordingly the same dismissed. No costs. Connected M.P. No. 1 of 2008 is also dismissed.