
(2009) 10 MAD CK 0152
In the Madras High Court
Case No : S.A. No. 115 of 2001

Rajagopal

APPELLANT

Vs

Anjali, Elumalai, Veeraraghavan and Lakshmi

RESPONDENT

Date of Decision : 19-10-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2009) 10 MAD CK 0152

Hon'ble Judges : S. Tamilvanan, J

Bench : Single Bench

Advocate : K. Hariharan, for the Appellant; J. Srinivasa Mohan, for the Respondent

Final Decision : Dismissed

Judgement

S. Tamilvanan, J.—The Second Appeal has been preferred against the judgement and decree dated 21.3.2000 made in A.S. No. 3 of 2000 on the file of Principal District Judge, Chengalpet confirming the judgment and decree dated 30.8.99 made in O.S. No. 172 of 1988 on the file of the District Munsif Court, Chengalput.

2. The appellant herein had filed the suit seeking relief of declaration of title and consequently, permanent injunction restraining the defendants from in any manner interfering with the peaceful possession and enjoyment of the plaintiff, in the suit schedule property. After contest, the suit was decreed as prayed for by the trial court. Aggrieved by the same, the respondents/defendants preferred an appeal, the first appellate Court, confirming the judgment and decree of the trial court, dismissed the appeal without costs. However, it was observed by the court below that the respondent/plaintiff is directed not to disturb the defendants 2 to 5 in respect of an extent of 0.12.0 hectare in Survey No. 297/9B, by taking advantage of old Survey No. 297/1B of the property. Aggrieved by the said direction the plaintiff in the suit has preferred the second appeal.

3. Mr. K. Hariharan, learned Counsel for the appellant submits that the trial court

decreed the suit as prayed for. Though the first appellate court has confirmed the judgment and decree of the trial court, has given a further direction against the appellant/plaintiff, against law, hence, the second appeal is preferred. The suit has been decreed with reference to the property in Old S. No. 297/1B and new S. No. 297/9B to an extent of 0.52.5 hectares and for S. No. 297/9A an extent of 0.53.5 hectares. It is seen that the first appellate court while confirming the judgment and decree of the trial court, has observed that the appellant/plaintiff is directed not to disturb the possession and enjoyment of the defendant in respect of 0.12.0 extent of land in Survey No. 297/9B, by taking advantage of old Survey No. 297/1B. According to the learned Counsel for the appellant, the finding of the first appellate court is unwarranted and also without jurisdiction. Therefore, the appellant herein has come forward with the present Second Appeal challenging only the portion of the judgment rendered by the appellate court below in favour of the respondents/defendants.

4. Per contra, Mr. J. Srinivasa Mohan, learned Counsel for the respondents/defendants submits that as per original of Ex.B1, Angammal, mother-in-law of the first respondent had purchased 0.34 cents in S. No. 297/9B from the father of the appellant herein. It is not in dispute that as per Ex.A1, Kumaraswamy Naicker, father of the appellant herein had purchased only 1.61 acre in S. No. 297/1B on 29.3.1956, hence, the appellant/plaintiff is entitled to claim only 1.27 acre, since father of the appellant subsequently sold an extent of 34 cents in S. No. 297/9B to the mother of the first respondent, however, the appellant has claimed relief for a larger extent, though he is entitled to an extent of 1.27 acres.

5. During the course of arguments, it is made clear that respondents/defendants have not disputed the appellant's right with regard to the first item of the schedule of property in S. No. 297/1B and new S. No. 297/1B. Learned Counsel for the respondents submits that in view of Ex.B1, the respondents/defendants are entitled to 34 cents in S. No. 297/1B and therefore, considering the fact that the first appellate Court while confirming the judgment and decree passed by the trial court has directed the appellant/plaintiff, not to disturb the possession and enjoyment of the defendants/respondents in respect of 0.74.05 hectare in S. No. 297/1B by taking advantage of old S. No. 297/1B, hence according to the learned Counsel for the respondents, there is no illegality in the impugned judgment. Learned Counsel for the respondents also drew the attention of this Court to the admission made by the appellant herein as P.W.1, before the trial court. As per the certified copy of the deposition, the appellant/plaintiff has admitted that old Survey Number of the suit property was 297/1B. As per Ex.A1-sale deed dated 29.3.1956, Kumarasamy Naicker, father of the appellant/plaintiff had purchased only 1.61 acre of land in S. No. 297/1B from one Sonibai, and out of which, sold 34 cents to Mrs. Angammal, mother of the first respondent and grand mother of the respondents 2 to 4, hence, the petitioner cannot claim more than 1.27 acres of land, as legal heir of Kumarasamy Naicker.

6. Learned Counsel for the appellant contended that it was only a benami

transaction and the property was purchased by the present appellant in the name of his father. As per the plaint averments, in 1988, the age of the appellant/plaintiff is stated as 53 years and therefore on 29.3.1956 when the property was purchased under Ex.A1, his age could have been 21 years, further there is no legally acceptable evidence to show that the property was purchased by the appellant/plaintiff, in the name of his father. He further contended that the transaction had taken place prior to Benami Transaction Abolition Act. Learned Counsel for the appellant submitted that prior to Benami Transaction Abolition Act, coming into force, a person could establish as benami transaction as per the procedure contemplated under law, whereby claim right to the property. In the instant case, there is no evidence to show that the plaintiff had purchased the property in the name of his father, while he was 21 years old. Further, there is no evidence adduced before the Courts below to establish that he had any source of income to purchase the property as "Benami" in the name of his father while he was 21 year old youth.

7. Based on the grounds of appeal and the submissions of the learned Counsel for the appellant the following substantial questions of law were framed for the disposal of Second Appeal:

- 1) Is the Lower Appellate Court right in coming to a different finding without any material by reversing the well considered judgment of the trial court?
- 2) Is the Lower Appellate Court right in assuming that S. No. 297/9 forms part of and correlate to old S. No. 297/1B and is there any material before the Lower Appellate Court to hold that S. No. 297/1B was subdivided into new S. No. 297/9A and 9B?
- 3) Having seen that Ex.A-8 is not proved and by commenting that in a way it is proved, is it open to the Lower Appellate Court to hold that Ex.A8 WILL is proved and even assuming so, is it open tot he Lower Appellate Court to hold that the WILL by itself confers any right and title on the legatees and is it not open to third parties to canvass their independent rights to he properties and by mere proof of WILL can it divest or be an answer to the claim of third parties?
- 4) The Lower Appellate Court should have seen that WILL is a mere act of succession and not a document of title?
- 5) Having declared the title and upheld the possession of the plaintiff and having given the relief of declaration and injunction regarding the suit property in favour of the plaintiff, is it open for the Lower Appellate Court to pass an obiter dicta on the assumption that the plaintiff may attempt to disturb the defendant's possession in respect of S. No. 297/9B for 30 cents or so without there being prayer by defendants or payment of any court fees in that respect?
- 6) Can the Lower Appellate Court independently grant decree of declaration and injunction in favour of the defendant with respect to the property which is not included in the suit schedule and will pass such relief in the suit not dealing with

such survey number?

7) Has the Lower Appellate Court jurisdiction to pass a decree and given an obiter finding with respect to the property which is not suit schedule and has the Lower Appellate Court not exceeded the jurisdiction?

8) Has the Lower Appellate Court not acted with material irregularity or error apparent on the face record?

9) Is the finding that S. No. 297/9B is likely to be disturbed by the plaintiff, not perverse finding of fact liable to be set aside u/s 100 of C.P.C.?

10) Is the decree granted by the Trial Court in favour of the defendants without any prayer or court fee by the defendant, sustainable within the meaning of the provisions of Specific Relief Act.

11) In any event the Lower Appellate Court should have confirmed the decree and judgment of the Trial Court and stopped with that.

8. Substantial Questions of law 1 and 2: The appellant/plaintiff has raised the first substantial questions of law, Whether the Lower Appellate Court is right in coming to a different finding without any material by reversing the well considered judgment of the Trial Court?

9. According to the appellant/plaintiff, the appellate court has decided the land in S. No. 297/9B, by correlating, Old No. 297/1B without any basis. It is an admitted fact that the father of the appellant/plaintiff had sold 34 cents of land to the predecessor in title of the respondents/defendants.

10. It is seen that the Trial Court declared that the plaintiff is entitled to the suit property and also restrained the defendant by an order of permanent injunction from interfering with the peaceful possession and enjoyment of the plaintiff in the suit property and the First Appellate Court also confirmed the Judgment and Decree passed by the trial Court and dismissed the appeal, however directed the appellant/plaintiff not to disturb the possession and enjoyment of the defendants 2 to 5 who are the respondents herein in respect of an extent of 0.12.0 hectares in Survey No. 297/9B, taking advantage of the Old Survey No. 297/1B and the new Survey Number.

11. According to the learned Counsel appearing for the appellant, the first appellate Court has granted the relief in favour of the respondents/defendants, without any counter claim and payment of Court fee by them hence, the same is legally not sustainable.

12. It is seen that all the 11 substantial questions of law raised by the appellant herein are revolving on the same point, whether the first appellate Court is correct in granting the relief in favour of the respondents/defendants, when there is no cross appeal or counter claim and payment of court fee. So far as the land, an extent of 1.27 acres in Old S. No. 297/1B and New S. No. 297/8 is concerned, there is no dispute that the property belongs to the appellant herein and the

same is also in the possession and enjoyment of the appellant. However out of the total extent of 1.61 acres of land owned and possessed by the father of the appellant, 34 cents of land was sold by him in favour of the respondents predecessor in title, which is also an undisputed fact.

13. The respondents have raised their objections stating that the appellant is not entitled to an extent of 1.32 acres of land in S. No. 297/9A as claimed by him. It is an admitted fact that the property in Survey No. 297/1B, only an extent of 1.61 acres of land was purchased under Ex.A1 on 29.03.1956, by Kumarasamy Naicker, father of the appellant. The appellant/plaintiff has stated that he purchased the property in the year 1956 in the name of his father, which cannot be accepted, considering the age of the appellant and his father and also on the fact of non-establishing the source of income of the appellant herein on the date of purchase of the property and other relevant factors.

14. Learned Counsel appearing for the appellant/plaintiff submits that the bar of Benami Transaction Act is not applicable, since the said sale had taken place in the year 1956 prior to the said Act coming into force. Even in the plaint, the appellant herein has stated his age was 53 years, when the suit was filed on 01.03.1988 and there is no evidence produced before the court below, to establish that the appellant/plaintiff had purchased the property in the name of his father and to show any source of income of the appellant to purchase the property. As per Evidence Act, the oral testimony of the appellant does not impeach the averments available in Ex.A1, a documentary evidence, by which the right in the property is claimed by the appellant herein. It is made clear that as per this document, Kumarasamy Naicker, father of the appellant had alone purchased the property and not the appellant. The benami transaction pleaded by the appellant cannot be accepted at this stage, without any acceptable evidence. He being the son and the legal heirs of Kumarasamy Naicker and having failed to establish even the source of his income to purchase the property, the appellant cannot establish the plea of benami transaction in his favour. Under Ex.A1, only an extent of 1 acre 61 Cents of land was purchased by the father of the appellant. Under Ex.B1, on 27.11.1957, the said Kumarasamy Naicker sold an extent of 34 cents in Survey No. 297/1B and as per the document, the appellant's father has asserted that the property was acquired by him as his self-acquired property and further, as per the evidence available on record, it is clear that there could be no necessity for the appellant to purchase the property in the name of his father in the year 1956, hence the said claim of the appellant cannot be accepted. The appellant has also not challenged the sale of 34 cents by his father under Ex.B.1.

15. The learned Counsel appearing for the respondents submitted that the Survey No. 297/1 was subsequently sub-divided. Pursuant to Ex.B1 sale deed executed by the father of the appellant and the same is also in the possession and enjoyment of the respondents herein. The respondents herein as defendants in the suit had denied the benami transaction alleged by the appellant/plaintiff

with reference to Ex.A1, Sale Deed dated 29.03.1956. As per the sale deed, the property was only a self-acquired property of Kumarasamy Naicker. Under Ex.B1, out of an extent of 1.61 acres in Survey No. 297/B, Kumarasamy Naicker, sold an extent of 34 cents in favour of Angammal, mother of the first respondent and grand mother of the respondents 2 to 4.

16. The learned Counsel appearing for the appellant submitted that the Trial Court had decreed the suit as prayed for. However by the impugned judgment and decree, dated 21.03.2000, the first appellate court, though confirmed the judgment and decree dated 30.08.1999 made in O.S. No. 172 of 1988 on the file of the Trial Court and dismissed the appeal, directed the appellant/plaintiff herein not to disturb the possession and enjoyment of the respondents 2 to 5 / defendants 2 to 5 in respect of an extent of 0.12.0 hectares (34 cents) in Survey Number 297/9B taking advantage of the Old Survey number 297/1B.

17. According to the learned Counsel appearing for the appellant there is no counter claim and no payment of court fee paid for the relief sought for, hence, the first Appellate Court could not have granted the relief in favour of the respondents/defendants. Only against the said relief granted, the second appeal has been preferred by the appellant/plaintiff. According to the appellant, the finding of the first Appellate Court is not correct in granting the said relief in favour of respondents/defendants in reversing the judgment of the Trial Court.

18. It was argued by the appellant that even assuming that the land in S. No. 297/9B forms part of the land to correlate old S. No. 297/1B, there is no material before the Lower Appellate Court to hold that S. No. 297/1B was subdivided into new S. No. 297/9A and 9B. According to the appellant Exhibit B-8, WILL has not been proved, as per procedure known to law. Even if it is proved, the WILL by itself does not confer any right or title on the legatees and it is not open to third parties to canvass their independent rights to the properties, since the WILL is a mere act of succession and not a document of title. According to the appellant, having declared the title and upheld the possession of the appellant/plaintiff, granted relief of declaration and injunction in respect of suit property in favour of the appellant, it is not open to the Lower Appellate Court to pass an " obiter dicta" on the assumption that the plaintiff may attempt to disturb the respondents possession in respect of S. No. 297/9B, a 34 cents of land, without being a prayer by respondents and payment of Court fee.

19. It is further contended by the learned Counsel for the appellant that the Appellate Court cannot grant independently a decree of permanent injunction in favour of the respondent/defendant in respect of the property, as the same is not a part of the suit schedule property. The Lower Appellate Court, has no reason to pass the decree by giving an obiter finding with regard to property which is not in the suit schedule and that the first Appellate Court exceeded the jurisdiction.

20. According to the learned Counsel appearing for the appellant, the first Appellate Court has rendered its judgment with material irregularity and that

there is error apparent on the face of the record. Learned Counsel for the appellant further submitted that the finding of the court below that the land in S. No. 297/9B, likely be disturbed by the plaintiff is perverse and hence the same is liable to be set aside. It was further contended that the relief granted by the first Appellate Court in favour of the respondents/defendants, without any prayer and payment of Court fee by the respondent/defendant is unsustainable under the provisions of Specific Relief Act. It was further submitted that the first appellate court could have confirmed only the judgment and decree passed by the trial Court and should not have granted any relief in favour of the respondents/defendants, as there was no relief sought for by the respondents/defendants.

21. The suit was admittedly filed by the appellant herein who was the plaintiff before Trial Court, seeking declaration of title to the suit property and permanent injunction restraining the respondents defendants from in any manner interfering with the peaceful possession and enjoyment of the suit property. In the plaint the schedule of property is stated as follows:

In Thandalam Village, Chengalpattu Taluk and comprised in patta 174 (Old Patta 96) Nanja Old S. No. 297/1B and New S. No. 297/8-0.52.5 Kist 1.95; S. No. 297/9A - 0.53.5 Kist 1.98.

22. The trial court has decreed the suit as prayed for. The first appellate court, though confirmed the judgment and decree passed by the trial court and dismissed the appeal, directed the appellant/plaintiff not to disturb the respondents/defendants possession and enjoyment of an extent of 0.12.0 hectares of land in Survey. No. 297/9B, by taking advantage of the old survey No. 297/1B. Therefore, only the real substantial question of law raised by the appellant could be whether the first Appellate Court is right in directing the appellant/plaintiff not to disturb the possession enjoyment of the respondent/defendant, in respect of 34 cents of land, while confirming the judgment and decree passed by the trial court and dismissing the appeal.

23. It is an admitted fact that there is no counter claim by the respondent/defendant against judgment and decree passed by the Trial Court. As the Trial Court has decreed the suit as prayed for, in the absence of any counter claim or cross appeal, the appellate court could not have granted any relief, by way of a decree. However the court is not prohibited in giving a finding based on evidence, to meet the ends of justice, even in case, no relief is sought for and no Court fee being paid. However in granting the relief in favour of the respondents/defendants, there could have been counter claim or cross appeal and payment of court fee, therefore, the relief granted by the first Appellate Court in favour of the respondents/defendants with reference to 0.12.0 hectares in Survey No. 297/9B, old Survey No. 297/1B is not legally sustainable. However based on the evidence, to meet the ends of justice, the court below has given its finding, based on evidence for which there is no legal bar. The substantial questions of law relating to other aspects which are not directly relevant to the relief granted by the impugned judgment and decree and further such questions cannot be

construed as substantial questions of law in the second appeal.

24. Only the alleged relief granted in favour of the respondents/defendants, as per the impugned Judgment under challenge in the second appeal, reads as follows :

That the respondent/plaintiff be and is hereby directed not to disturb the possession and enjoyment of the appellant/defendants 2 to 5 in respect of an extent of 0.12.0 hectares in Survey Number 297/9/B, by taking advantage of Old Survey Number 297/1B.

25. Learned Counsel for the appellant submitted that the relief granted in favour of the respondents/defendants, has to be set-aside, on the ground that there was no counter claim and cross appeal and payment of Court fee by the respondents. So far as Ex.A-8, WILL is concerned, as contend by the learned Counsel appearing for the appellant, it cannot be construed as a document of title, but it is a mere act relating to the right of succession. The appellant herein is only a stranger to the Will, hence the Will executed by the mother of the first respondent is nothing to do with the appellant/plaintiff.

26. It is an admitted fact that the Appellate Court has not reversed the finding of the Trial Court, as it has confirmed the judgment and decree passed by the trial court and dismissed the appeal. However, the First Appellate Court has not granted any decree in favour of the respondents, while confirming the Judgment and Decree passed by the trial court, with reference to 0.12.0 hectares in Survey No. 297/9B, stating that the old number for the same, as S. No. 297/1B. The respondents claim right only for 34 cents, based on the sale deed. Ex.B.1 executed by the father of the appellant, who owned the entire property. Hence, the appellant/plaintiff cannot dispute the title as well as the possession of the property, by the respondents by virtue of the sale deed, Ex.B.1, as contended by the learned Counsel for the respondents/defendants. Therefore, the relief granted by the appellate court in favour of the respondents could be a finding, based on the evidence, it cannot be construed as a decree granted in favour of the respondents/defendants, in the absence of counter claim and payment of court fee, for the relief so granted. Accordingly, the substantial questions of law 1 and 2 are answered, holding that the appellate court has not reversed the Judgment of the trial court, but only given its findings based on evidence.

27. Substantial Questions of Law 3 and 4: It is a settled proposition of law that a Will cannot be construed as document of title, which may be a relevant document to decide the succession. The appellant is a third party to the Will, Ex.A.8, hence, the same is not binding on him. However, the appellant cannot dispute the right of the respondents in respect of 34 cents of land. In the instant case, the respondents claim right under the sale deed, Ex.B.1, executed by the father of the appellant. The legal heir ship cannot be disputed by the appellant, a stranger to the respondents family. Accordingly, the substantial Questions of law 3 and 4 are answered, holding that the Will, Ex.A.8 cannot be construed as a

document of title, it is only an act decide succession, however, the finding of the appellate court in favour of the respondents is based on evidence. The questions 3 and 4 raised by the appellant are no way be construed as substantial questions of law to decide the issue involved in this second appeal.

28. Considering the entire facts and circumstances of this appeal, I am of the view that the alleged substantial questions of law 5 to 8 raised by the appellant also not relevant in deciding this second appeal. The only legal plea raised by the appellant/plaintiff in the second appeal could be, whether the appellate court is empowered to give direction to the respondents, in the absence of counter claim or cross appeal and payment of court fee in favour of the respondents/defendants. The appellate court has not granted any decree in favour of the respondents. It is made clear that only the father of the appellant had purchased 1.61 acres of land, out of which, he sold 34 cents of land in favour of the mother of the first respondent. The appellant has not challenged the sale deed, Ex.B.1, executed by his father in favour of Angammal, mother of the first respondent. The appellant cannot claim right to a part of the land covered under Ex.B.1. Hence, while confirming the Judgment and Decree passed by the trial court, the appellate court has directed the appellant not to disturb the property, an extent of 34 cents purchased under Ex.B.1. Only to meet the ends of justice, the appellate court has given the finding, for which there is no legal bar. There is no illegality or error in the Judgment to be set aside, as it has been made clear, only to meet the ends of justice. It cannot be construed as a decree granted in favour of the respondents and defendants. Accordingly substantial questions of law 5 to 8 are answered.

29. Substantial Questions of Law 9 to 11 : It has been established that Kumarasamy Naicker, father of the appellant owned the entire property, an extent of 1.61 acres land in the survey number and it was his self acquired property, out of which, an extent of 34 cents of land was purchased under Ex.B.1 by the mother of the first respondent and predecessor in title of the respondents/defendants from the father of the appellant/plaintiff. Hence, the appellant herein could claim title only to an extent of 1.27 acres of land, in view of the sale made by his father under Ex.B.1. But the appellant/plaintiff has claimed declaration of title and injunction in respect of 1.32 acres of land, more than the extent available after Ex.B.1 sale. After selling 34 cents of land under Ex.B.1, the appellant is further left only 1.27 acres of land and that was inherited by the appellant/plaintiff. The appellant cannot claim any right in respect of 34 cents sold by his father, as it was his self acquired property. It is well settled that law is only a means and justice is the end. Similarly, law is only a servant, whereas justice is the master. Hence, law cannot prevail over justice, when the factual aspects are undoubtedly clear. While confirming the Judgment and Decree in favour of the appellant/plaintiff, the appellate court has passed the order, only to safe guard the rights of the respondents/defendants, in respect of 34 cents purchased from the father of the appellant/plaintiff. Hence, I could find no error in the finding of the appellate court, except the legal aspect, the direction cannot

be a decree to argue and that no decree could be granted in the absence of relief sought for and payment of court fee in favour of the respondents/defendants. On the aforesaid facts and circumstances, this Court is of the view that the finding of the court below that Survey No. 297/9B cannot be construed as perverse finding, as the same has to be construed only a finding, based on evidence. It is a settled law that no decree can be granted, without the relief, being sought for and without paying court fee in favour of any person. It is only a decree in favour of the appellant/plaintiff, whereby to meet the ends of justice, appellant/plaintiff has also been directed not to disturb the possession and enjoyment of the land purchased under Ex.B.1 from the father of the appellant, from whom the appellant inherited the balance of the land purchased by him. Accordingly, the substantial questions of law 9 to 11 are answered.

30. On the aforesaid findings, I am of the view that the second appeal need not be allowed, however, it needs to be clarified. Accordingly, it is made clear that the appellate court has confirmed the judgment and decree passed by the trial court, however, based on evidence, to meet the ends of justice, the appellate court has given a finding recognising the right of the respondents/defendants, under the sale deed, Ex.B.1 executed by the father of the appellant, through whom the appellate has got right to the property.

31. In the result, the second appeal is dismissed with the above observation and both parties are directed to bear their own costs in the Second Appeal.