

(2009) 06 MAD CK 0127
In the Madras High Court
Case No : S.A. (MD) No. 986 of 2002

Sundararajan and Dharmalingam

APPELLANT

Vs

Mahalingam @ Chockalingam, Vaithialingam, Chinthamani
and Karupayee

RESPONDENT

Date of Decision : 22-06-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 7
Evidence Act, 1872 — Section 90
Industrial Disputes Act, 1947 — Section 11A

Citation : (2009) 06 MAD CK 0127

Hon'ble Judges : R. Mala, J

Bench : Single Bench

Advocate : V.K. Vijayaraghavan, for the Appellant; K. Balasundharam, for the Respondent

Judgement

R. Mala, J.—This Second Appeal has been filed against the judgment and decree made in A.S. No. 8 of 1997, dated 23.09.1998, on the file of the Additional District Judge/cum-Chief Judicial Magistrate, confirming the judgment and decree made in O.S. No. 407 of 1986, dated 07.09.1990, on the file of the District Munsif, Aranthangi.

2. The gist and essence of the averments in the plaint is as follows:

The suit property originally belongs to one Vettikaruppan. He is having three sons by name Aavan, Samban and Velu. Samban is having only one daughter by name Karupayee and she is the plaintiff herein. The plaintiff and her parents resides at Srilanka. She got married to one Muthusami of Aranthangi. The third son of vettikaruppan has died leaving behind the second defendant Mahalingam, who is now residing at Sri lanka. Aavan died 35 years ago. Aavan has four daughters and one son. His only son and wife died long back. The son died without marriage. The four daughters are by name Aaki, Karupayee, Aarayee and Lakshmi. Out of them, Aaki is at Srilanka. The first defendant had married the

second daughter of Aavan. The plaintiff has purchased the property of Aavan under a sale deed dated 06.12.1948. After purchase, he handover the same to Aavan and left to Sri Lanka. Then she returned back only in the year 1976 and resides in India permanently. After the death of Aavan, his son-in-law, the first defendant herein has managed the suit properties belonging to Aavan. During the lifetime of Aavan, he obtained a settlement deed in respect of the joint family properties, under influence. Aavan has no right to execute a settlement deed in favour of the first defendant herein./ In pursuance of the settlement deed, he obtained a patta in his name. Now only, the plaintiff came to know that the patta stands in the name of the first defendant herein. But the first defendant has not acquired any right in the suit properties. As soon as the plaintiff returned from Sri Lanka, the first defendant handed over the item No. 1 of suit properties which is a house site and a portion of the suit properties to her. The plaintiff was demanding the father's one third share in the suit properties. But the defendant has denied the same, but, obtained a patta in his name. So the plaintiff preferred an appeal before the District Revenue Officer, Aranthangi in turn who gave a direction to work out the remedy before the proper civil forum. Hence the plaintiff has come forward with a suit for declaration that the suit properties jointly belongs to the plaintiff and second defendant and for possession of suit properties from first defendant to plaintiff and second defendant and for costs.

3. The gist and essence of the written statement filed by the first defendant is as follows:

The suit is not maintainable both in law and facts. The relationship is not an admitted one. Vettikaruppan has only one son by name Aavan. The first defendant is the son-in-law of the said Aavan. The geneology is not correct. The first defendant is not aware about the second defendant. The plaintiff is also not the daughter of Samban. It is also not true to say that the plaintiff came to India in the year 1948 and obtained the alleged sale deed dated 06.12.1948. It is also false to state that the plaintiff entrusted the purchased properties with the said Aavan and then went to Ceylon. The fact that the first defendant managed the suit properties belonging to Aavan is absolutely false. The first defendant did not obtain any settlement deed from the said Aavan, since the said Aavan has no right over the suit properties. Kist receipts filed by the plaintiff are not related to the suit properties. The first defendant's wife Karupayee, Aaki, Aarayee and Lakshmi are daughters of Aavan and now Aaki is residing at Ceylon. The first defendant married Karupayee, the daughter of Aavan. There is no relationship between the plaintiff or second defendant with the first defendant or first defendant's wife. The first item of the suit properties in S.No. 229/3, 0.13 cent belonged to one Saminatha Thevar. He sold the same besides another properties to the first defendant and his brother under a registered sale deed, dated 22.05.1954. This defendant's brother also died long ago without any issue. This defendant is the absolute owner of the first item of the suit properties. The second and third item of the suit properties are the ancestral properties of this defendant. This defendant is the absolute owner and possession of the same. So

patta has been granted in the name of this defendant. The local name of the second item of the suit properties is "Sanjaya Punjai" and third item is "Veeramarathu Punjai". The local name of the first item of the suit properties is "Kanakkan Sei Nangai". Thus, this defendant is in continuous and uninterrupted possession and enjoyment of the suit properties and also has adverse title to the same. U.D.R Patta has been granted in the name of this defendant for the suit properties and second item of the suit property has been sub-divided into New Survey No. 272/3A and 272/3B. The plaintiff came to India as a repatriate from Sri Lanka about seven years ago and after obtaining loan from the Government under the Repatriate Scheme, this defendant is residing at Nattumangalam. This defendant never gave any property to the plaintiff. This plaintiff with a malafide intention filed petition before the Revenue Divisional Officer, Aranthangi, with respect to the second and third item of the suit properties, by claiming one third share thereon. The plaintiff restricted her right before the Revenue Divisional Officer only to one third of alleged share, wherein, now the plaintiff is claiming the entire extent of the suit properties. The plaintiff is not having any right over the suit properties. The plaintiff is not impleading the other daughters of Aavan in the plaint. The suit is barred by non-joinder of necessary parties. The plaintiff did not demand partition as on 20.04.1984. No cause of action arose for the same. Hence, he prayed for the dismissal of the suit.

4. The Trial Court after considering the averments made both in the plaint as well as Written statement, framed six issues and after considering the oral evidence, Ex.A1 to Ex.A8, Ex.B1 to Ex.B8 and the evidence of P.W.1, P.W.2 and D.W.1, dismissed the suit. Against that, the plaintiff has preferred A.S.No. 8 of 1997, on the file of the Additional District Judge-cum-Chief Judicial Magistrate, Pudukkottai. The first appellate court after considering the arguments of both sides and after framing four points for consideration, dismissed the appeal, stating that the appellant plaintiff is entitled to two third share in the suit property. Since he has filed suit only for declaration and for recovery of possession, hence he is not entitled for a decree and dismissed the appeal. Against that the present appeal has been preferred by the plaintiff/applnt.

5. This Court after considering the entire material records, admitted the second appeal and framed the following substantial questions of law:

1. Whether the Lower Appellate Court was correct in dismissing the appeal when plaintiff/appellant was declared entitled to two third share in the suit properties?

2. On the facts and circumstances of the case, whether the dismissal of the appeal by the lower appellate court was tenable when the plaintiffs case and right to suit properties was accepted by the lower appellate court?

6. The appellant herein as the plaintiff filed a suit for declaration and for recovery of possession stating that the entire suit properties was belonging to one Vettikaruppan having three sons and they are Aavan, Samban and Velu, she has purchased the Avan's one third share in the suit properties under Ex.A1 in the

year 1948., since she is the only heir of Samban, who is second son of vettikaruppan, succeeded his father one third share, so she is entitled to two third share in the entire suit properties. Since she was married to one Muthuswamy, she gone to Ceylon, at that time she has handed over the properties what she purchased under Ex.A1 to Aavan for maintenance, Aavan's second daughter's husband is the first respondent, in her absence, he got Settlement Deed in respect of all the properties purchased under Ex.A2 and in pursuance of that he obtained patta, now, he refused to handover the item Nos. 1 and 2 of the suit properties under Ex.A1 and the trial court has considered this aspect and come to the conclusion that the appellant herein has failed to prove that she is the owner of the suit properties and dismissed the suit. He further contended that the first appellate court has come to the conclusion that she has proved that she is entitled to two third share in the suit properties, since she has not filed a suit for partition, but has filed a suit for declaration and for recovery of possession, so dismissed the appeal. In such circumstances, the learned Counsel for the appellant mainly focussed upon the argument that even though it is a suit for declaration and possession and this Court has the ample power to mould the relief according to the case. For the reason, the learned Counsel for the appellant relied upon the following decisions in:

(1) 1957 (1) MLJ 346 reported in Syed Mohideen Saheb, (2008(3) TNCJ 355(Mad (MB)) reported in Sivasamy and Ors. v. Poomalai and Ors. and Lakshmi (died) and Ors. v. Poomalai and Ors.(3) AIR 1952 Nag 202 reported in Gangaram Ramachandra v. Butrusao and Ors. and (4) U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, and pray for a preliminary decree of partition.

7. On the other hand, the learned Counsel for the respondent would submit that mere filing of a document is not sufficient to hold that she is the owner of the property. Ex.A1 does not contain any survey number and only boundaries are mentioned and no evidence has been adduced before this Court to correlate the suit property with Ex.A1 and that the finding of the lower appellate court is totally wrong and further submitted that already patta has been given in favour of first respondent/first defendant after recognizing his possession and enjoyment of the suit properties. Adangal has been marked as Ex.B6 to Ex.B16 and he purchased the property from one Swaminathan. and so he is the absolute owner of the suit properties and the second defendant is not related to his family and hence the appellants are not entitled for a preliminary decree of partition. The learned Counsel for the respondent further contended all the parties to the suit are to be impleaded and all the properties to the joint family are to be added in the plaint, but here all the co-owners are not impleaded in the suit, so the appellants are not entitled to any relief and relied upon a decision in 1974 (1) MLJ 84 and contended that mere filing of document is not sufficient to prove the title to the suit properties.

8. At that juncture, the learned Counsel for the appellant would contend that the respondent herein has not made any cross-appeal or separate appeal in respect

of finding by the lower appellate court that the appellant herein has claimed two third share by way of inheritance and by way of purchasing the same under Ex.A1 and so the second defendant is not entitled to canvass the point here.

9. Per contra, the learned Counsel for the respondent culled out Order 41 Rule 22 of C.P.C and submitted that without cross-objection or without preferring any separate appeal, he is entitled to canvass the finding given against him. While considering Order 41 Rule 22 of C.P.C, it is stated as follows:

22. Upon hearing respondent may object to decree as if he had preferred separate appeal.--(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree {but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour, and may also take any cross-objection) to the decree which he could have taken by way of appeal, provided that he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

(Explanation-- A respondent aggrieved by a finding of the Court on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is wholly or in part, in favour of that respondent)

(2) Form of objection and provisions applicable thereto--Such cross objections shall be in the form of a memorandum, and the provisions of Rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3)(***)

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule.

10. Admittedly, even though a finding has been given against the first respondent herein, he has not preferred a separate appeal or cross objection. It is true that the decree is not against him, but only the finding is against him. It is open to the respondent to take adverse finding arrived at or observation made by the court even if the respondent has not filed separate appeal. Even though the filing of cross-objection finding adverse to the respondent can be challenged by him in this appeal as per the decision reported by the Apex Court in Pannalal Vs. State Bombay and Others, and Anil Kumar Gupta and Others Vs. Municipal

Corporation of Delhi and Others, . So the respondent is entitled to canvas all the finding of the appellate court which is rendered against him.

11. The learned Counsel for the appellant would contend that he has not preferred any appeal and so that he cannot canvass the same. He relied upon a decision reported in 2006 2 LW 829 and urged that:

the first appellate court has considered the entire evidence elaborately and come to the conclusion that the plaintiff established the title and possession. Therefore this being purely a matter of evidence, this Court cannot re-appraise the same to come to a different conclusion.

While considering the above citation along with the facts of the case, as per Order 41 Rule 22 of C.P.C, it is open to the respondent to take adverse finding arrived at even if the respondent has not filed any separate appeal and cross objection. Moreover in the instant case, the trial court has dismissed the suit. The first appellate court alone decide the fact that the appellant has proved his title and come to the conclusion that he is entitled to two third share in the suit properties. In the above said circumstances, the above citation is not applicable to the facts of the present case.

12. The learned Counsel for the respondents would contend that the property has not been identified and mere marking of Ex.A1 is not sufficient and identification of the properties is necessary because there is no survey number mentioned in Ex.A4. While considering the document under Ex.A1, which is original document, as per Section 90 of Evidence Act, it can be reliable. But it is true that the property to be identified. To identify the suit property no one has been examined. She has not examined the revenue authorities to correlate the suit property with the property mentioned in Ex.A1.

13. For the above said proposition, the learned Counsel for the respondents would rely upon a decision reported in 1974 1 MLJ 87 reported in P. Sangili and Ors. v. Ramakrishnan and Ors. which reads as follows:

Where certain title deeds of ancient dates havebeen put forward to make out the title of a temple to the various items enumerated in the plaint schedule, it is the duty of the plaintiff to correlate the different items of the suit properties with the different title deeds he was putting forward in support of the title of the temple.

While considering the above citation that even though Ex.A1 is admissible in evidence, it does not contain survey number, so the identification of the property is necessary. But no one has been examined to correlate the suit property with the property mentioned in Ex.A1.

14. Since the respondent herein has purchased the same under Ex.B2 in respect of Item No. 1 and 2 and other is in possession. His possession is recognized and patta has been given as per Ex.B2 and Ex.B3. In pursuance of that he paid the kists which is marked as Ex.B17 to Ex.B28 and to prove the possession, Adangal was also filed under Ex.B6 to B17. The appellant herein has given an application

before the Revenue Divisional Officer and that notice has been marked as Ex.B5. As per Ex.A3, the Revenue Divisional Officer had dismissed the appeal with the direction to work out their remedy in civil forum. In such circumstances, the decision relied upon by the learned Counsel for the respondent reported a decision in Kuppuswami Nainar v. The District Revenue Officer Thiruvannamalai and Ors. reported in 1995 1 MLJ 426 and which reads as follows:

Exercise of - Revenue authorities deciding question of title in immovable property in patta proceedings order held, cannot be interfered within the writ proceedings.

The above citation is not applicable to the facts of the present case.

15. The learned Counsel for the respondents also relied upon a decision in Kaliyuga Kannan v. The Tahsildar Land survey and Settlement and Ors. reported in 2000 TLNJ 102 and submitted that the civil court has no jurisdiction to decide the facts including the name in patta. The above citation is not applicable to the facts of the present case. As per Ex.A3, there is a title dispute, so the revenue authority themselves have stated that to decide the title to the property before the appropriate forum. In such circumstances, the above said citation is not relevant for the case in hand

16. The learned Counsel for the respondents would contend that the appellant herein has not proved the title to the two third share of the suit property. The appellant herein has placed the title on the basis that she has purchased one third share of the property from Aavan and one third by succession and to prove the relationship, she has not examined anybody. She has examined P.W.2. While considering the entire evidence of P.W.2, the evidence is not trustworthy, so, unacceptable one. While considering P.W.1 and P.W.2's oral evidence, they have miserably failed to prove the relationship. So, this Court concludes that the appellant has failed to prove that she is the owner of two third share in the suit properties.

17. The learned Counsel for the respondents would rely upon a decision in Kannu Reddiar Vs. T. Palanirajan and Others, which reads as follows:

It is needless to point out that the plaintiffs shall succeed or fail on their own pleadings and evidence and not on the basis of any mistake committed by the defendants.

As already discussed, the appellant herein has not correlate the suit properties with Ex.A1, not proved the relationship that how she got the two third share in the suit property.

18. The learned Counsel for the appellants would contend that the first appellate court has decided the title since she is entitled to a partition and the suit has been dismissed, hence she is entitled for partition, as per the decision reported in Sivasamy and Ors. v. Poomalai and Ors. and Lakshmi(Died) and Ors. v. Poomalai and Ors. reported in 2008 (3) TNCJ 355. But the above said citation is not applicable to the facts of the present case.

19. He also relied upon a decision in Gobind Prasad Sinha Vs. Mst. Kulwanti and Others, which reads as follows:

In the present case, the plaintiff as well as the contesting defendant both alleging independent right, title and interest over the disputed plot, it was not for the court of appeal below to make out a new case for the parties and to hold that the plaintiff and the contesting defendants were entitled to half and half and that they were in joint possession. The Court cannot make out a new case for a party. It is true that the courts are bound to take into consideration all the rights of the parties to the suit, both legal and equitable and give effect thereto by their decrees as far as possible but the courts are not at liberty to grant a relief either not sought for in the plaint or that does not naturally flow from the grounds of claim as stated in the plaint.

The above citation is not applicable to the facts of the present case.

20. He also relied upon a decision Syed Mohideen Saheb In re reported in 1957 1 MLJ 346 which reads as follows:

The gift was valid,(ii) If the gift is otherwise valid, in a case like this, there can be no impediment to the Court directing a partition between the plaintiff in the right of his donor and the other sharer. Though the prayer was for declaration, it is in the interests of justice that the donee should be permitted to amend the plaint to introduce a specific prayer for partition by metes and bounds.

But the above citation is not applicable because, the other sharers are not impleaded in the suit.

21. The learned Counsel for the appellants would also rely upon a decision in U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, and urged that as per Order 7 Rule 7 of C.P.C., the court has every right to mould the relief, which reads as follows:

Order 7 Rule 7 of C.P.C confers power upon Court to mould relief in a given situation. The provisions of CPC are applicable to proceedings under Industrial Disputes Act. Section 11A of Industrial Disputes Act empowers the Labour Court, Tribunal and National Tribunal to give up appropriate relief in case of discharge of dismissal of workmen.

While considering the citation along the facts of this case, it is not applicable.

22. He also relied upon a decision in Natarajan v. R. Muthukrishnan reported in 2001 (4) CTC 513, which reads as follows:

Court can grant lesser relief instead of larger relief.

Court can always grant lesser relief to do substantial justice.

But the above citations are irrelevant to the facts of this case. The appellant herein has not correlate the suit property with Ex.A1 and not proved the relationship and not impleaded the co sharers. Hence the above citation is not

applicable to the facts of the present case.

23. The learned Counsel for the respondents would rely upon a decision in Nagayasami Naidu and Others Vs. Kochadai Naidu and Others, and urged that:

A party cannot be awarded relief on the basis not pleaded by him and on which there is no issue, merely taking advantage of some statements. In the pleadings or in the evidence made or given for a different purpose and with reference to a different issue. Such deviation from the pleading is permissible, very rarely and only in exceptional circumstances. If it can be postulated that the other side has unambiguously and unequivocally admitted, completely the factual or the legal basis on which relief could be moulded. In other words, it is the clear admission of the opposite party in the pleadings that confers jurisdiction upon the court to award relief on a basis different from one covered by the issues on which parties went to trial.

The above citation is squarely applicable to the facts of the present case.

24. He also relied upon a decision in T. Panchapakesan (died) and Others Vs. Peria Thambi Naicker (died) and Others, and urged that in a suit for partition all the parties interested in the suit property to be impleaded as a party which reads as follows:

In a suit for partition all the persons interested in the property should be impleaded as parties.

25. He would also rely upon a decision A. Ramachandra Pillai v. Valliammal(died) reported in 100 LW 486 and urge that failure to implead all the sharers in a partition suit will result in suit being dismissed for non-joinder of necessary parties.

26. Above all, the appellant/plaintiff has not proved that she is entitled to two-third share in the suit property. Hence, the above citations are not relevant.

27. As narrated above, even though the lower appellate court has come to the conclusion that the appellant was entitled to two third share in the suit properties but dismissed the appeal. But the appellant herein has failed to correlate the suit properties with the property under Ex.A1 and her relationship that her grandfather Vettikaruppan Samban having three sons and they are having children. She is the daughter of Samban who is the second son of Vettikaruppan Samban and second defendant is the son of Velu who is the third son of Vettikaruppan Samban. Here second defendant has not appeared and his whereabouts are not known and she failed to prove that Vettikaruppan samban is having three sons. They are Aavan, Samban and Velu and Aavan is having four daughters and they were not impleaded in the suit. In the above circumstances, in a suit for partition, parties interested in the properties are necessary to decide the share. So the first appellate court is correct in dismissing the suit. So as narrated above, there is no merits in this appeal.

28. Even though the first appellate court has come to the conclusion that the appellant is entitled to two third share in the suit properties, but, as discussed in paragraphs 14 to 17, the appellant herein has failed to prove that she is having two-third share in the suit properties. In view of the above finding, the finding of the first appellate court that the first appellant is entitled to two-third share in the suit properties is set aside. There is no merits in the Second Appeal and the same deserves to be dismissed.

29. In the result, the Second Appeal is dismissed. No costs.