
(2012) 03 MAD CK 0170

In the Madras High Court

Case No : A.S. No. 1012 of 2004 and C.M.P. No. 159 of 2012

Venkatasubramaniya Chettiar (Died), V. Shyam Sundar and APPELLANT
V. Swaroop Sundar

Vs

Perumal Chettiar and Others RESPONDENT

Date of Decision : 09-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Registration Act, 1908 — Section 17, 49
Stamp Act, 1899 — Section 35

Citation : (2012) 3 CTC 160

Hon'ble Judges : S. Vimala, J; R. Banumathi, J

Bench : Division Bench

Advocate : Hema Sampath, for Venkateswaran, for the Appellant; P. Valliappan, Advocate, for the Respondent

Final Decision : Allowed

Judgement

R. Banumathi, J.—Challenge in this Appeal is the judgment and decree in O.S. No. 6 of 2002 [25.2.2003] whereby the Additional District Judge, Fast Track Court, Kallakurichi has decreed the Suit for Partition holding that Plaintiff is entitled to half share in the suit properties. Unsuccessful Defendant has preferred the Appeal. Appellant-Defendant Venkatasubramaniya Chettiar and Respondent-Plaintiff Perumal Chettiar are the sons of Ramasamy Chettiar. The said Ramasamy Chettiar died intestate in 1956 leaving vast extent of properties in Chinnasalem, Kallakurichi and other surrounding villages. Subbulakshmi Ammal, mother of Appellant-Defendant and Respondent-Plaintiff died in 1998. During 1993, brothers are said to have divided the properties and the factum of partition was reduced to writing by Ex. B1-unregistered Partition Deed dated 26.5.1993.

2. Case of Respondent-Plaintiff is that during 1993, he was in a depressed state of mind due to breakdown of his son Nagesh's marriage with Meera which eventually ended in a divorce. Taking advantage of the mental condition of

Respondent-Plaintiff, Appellant-Defendant maneuvered to divide the properties by bringing about Ex. B1-unregistered Partition Deed and obtained Respondent-Plaintiffs signature in Ex. B1. There was no division of properties as stated in Ex. B1-unregistered Partition Deed and the said Partition Deed is hit u/s 17 of Indian Registration Act. Stating that Appellant-Defendant has brought about Ex. B1-unregistered Partition Deed to gain unjust enrichment under which a valuable landed properties in Chinnasalem was given to the Appellant-Defendant, Respondent-Plaintiff has filed the Suit for Partition and separate possession of his half share in the suit properties.

3. Resisting the Suit, Appellant-Defendant filed Written Statement contending that under Ex. B1-Partition Deed [26.5.1993] already a comprehensive and concluded partition between the parties was effected and that both Appellant-Defendant as well as Respondent-Plaintiff are in separate possession and enjoyment of their respective shares. Ex. B1-Partition Deed was executed with full knowledge of its contents and entered into between the brothers by mutual consent and therefore, Respondent-Plaintiff cannot resile from Ex. B1-Partition Deed and cannot seek to reopen the partition which had been validly concluded between the parties. Since Respondent-Plaintiff started encumbering the properties, after issuing notice, Appellant-Defendant had filed the Suit O.S. No. 1004 of 1998 on the file of Principal District Munsif Court, Kallakurichi for Permanent Injunction. During the pendency of the partition Suit (O.S. No. 6 of 2002), the said Suit O.S. No. 1004 of 1998 was withdrawn by the Appellant-Defendant.

4. On the above pleadings, seven issues were framed by the Trial Court. Respondent-Plaintiff (Perumal Chettiar) examined himself as PW1. Exs. A1 to A3 were marked. On the side of Appellant-Defendant, Appellant-Venkatasubramania Chettiar was examined as DW1. Witness to Ex. B1-unregistered Partition Deed viz., Venkatavarathan was examined as DW2. Ex. B1 was marked.

5. Upon consideration of oral and documentary evidence, Trial Court held that u/s 17 of Indian Registration Act, Partition Deed is compulsorily registrable and Ex. B1-unregistered document cannot be received in evidence. Trial Court held that there is no positive proof produced to prove the valid partition between the brothers. Insofar as house properties in Chinnasalem which was not included in the suit properties, Trial Court held that house properties had fallen to Respondent-Plaintiffs share in the past in 1968 where the family divided the commercial properties. On those findings, Trial Court passed preliminary decree for partition of Respondent-Plaintiffs share in the suit properties.

6. Pending Appeal, sole Appellant - Venkatasubramania Chettiar died and his legal representatives (two sons) were brought on record as Appellants 2 & 3. Since some of the legal representatives have not joined with the Appellants 2 & 3, they were impleaded as Respondents 2 to 7 in the Appeal. For convenience, the parties are referred as per their array in the Suit. Deceased Appellant-Venkatasubramania Chettiar is referred as Defendant hereinafter.

7. Ms. Hema Sampath, learned Senior Counsel for Appellants contended that Trial Court failed to note that brothers have effected partition and there was division in status and the same was reduced to writing under Ex. B1-Partition Deed (26.5.1993) and while so, 1st Respondent-Plaintiff is estopped from denying the factum of partition. It was submitted that Trial Court erred in rejecting Ex. B1 on the ground that Ex. B1 is an unregistered document. It was further submitted that there was mutation of revenue records and parties are separately paying kist and other taxes which was not properly appreciated by the Trial Court. To substantiate their contention, Appellants have filed C.M.P. No. 159 of 2012 under Order 41, Rule 27, C.P.C. to receive additional documents.

8. Mr. P. Valliappan, learned Counsel for 1st Respondent-Plaintiff has contended that Ex. B1 creates rights in praesenti and therefore, Ex. B1 is necessarily to be registered and Ex. B1 being unregistered was rightly not received in evidence by the Trial Court. In so far as receiving of additional documents, it was submitted that no grounds as contemplated under Order 41, Rule 27, C.P.C. are made out to receive the additional documents. Learned Counsel for 1st Respondent-Plaintiff contended that on the basis of Ex. B1-unregistered Partition Deed, 1st Respondent-Plaintiff cannot be deprived of his legitimate share in the suit properties.

9. Upon consideration of rival contentions, the following points arise for consideration:

i. Whether the Trial Court was right in rejecting Ex. B1 [26.5.1993], finding that the contents of Ex. B1 cannot be looked into for any purpose?

ii. Whether the additional documents filed by the Appellants are to be received in evidence?

iii. To what relief, the parties are entitled to?

10. The undisputed facts are that father of Plaintiff and Defendant died in 1956. Their mother Subbulakshmi Ammal died in 1998. Family owned vast extent of property both agriculture as well as commercial properties. Earlier in 1967-1968, there was a family arrangement between the Plaintiff and the Defendant in which brothers divided the commercial properties and houses. As per the said arrangement, 1st Respondent-Plaintiff got his share of operating buses from Kallakurichi and bus shed in Kallakurichi. 1st Respondent-Plaintiff also got house at Kallakurichi, Theatre at Chinnasalem and Raja Rajeswari Rice Mill at Chinnasalem. In the said arrangement, Defendant got Theatre in Virudhachalam and buses operating in Virudhachalam and also bus shed thereon. Defendant also got house in Virudhachalam and Kamatchi Rice Mill at Chinnasalem. The landed properties were continued to be jointly enjoyed by the parties.

11. Case of 1st Appellant-Defendant is that the undivided landed properties and also the house at Chinnasalem were partitioned in 1993 and the same was reduced to writing under Ex. B1-Partition Deed (26.5.1993). In the said partition,

elder brother [Defendant-Venkatasubramania Chettiar] got "A" schedule properties and younger brother [Plaintiff-Perumal Chettiar] got "B" schedule properties. Further case of Defendant is that there was division in status and parties were in separate possession and enjoyment of their respective share of properties.

12. Per contra, case of 1st Respondent-Plaintiff is that in 1992-1993, there was a problem in his family on account of broken marriage of Plaintiffs son Nagesh and his wife Meera which later ended in divorce in 1994 and on account of his family problem, Plaintiff was in a depressed mood. Further case of Plaintiff is that taking advantage of his depressed mental condition, Defendant-Venkatasubramaniya Chettiar brought Ex. B1-unregistered Partition Deed on 26.5.1993 and got signature of the Plaintiff without disclosing the contents. 1st Respondent-Plaintiff thus admits his signature in all twelve pages of Ex. B1; but would state that he did not know the contents. The relevant portion of evidence of PW1-Perumal Chettiar reads as under:

The above version of the Plaintiff [PW1] is to be considered in the light of the financial status and position of the parties.

13. 1st Respondent-Plaintiff and 1st Appellant-Defendant are not normal rustic villagers. Admittedly, both 1st Respondent-Plaintiff and 1st Appellant-Defendant are doing business, running Theatres, operating buses and also operating Rice Mills. When the 1st Respondent-Plaintiff is doing the business to such a vast extent, it is quite improbable that he would have signed in all twelve pages of Ex. B1 without knowing its contents. 1st Respondent-Plaintiff could not have signed the document (Ex. B1) without knowing its contents. When the 1st Respondent-Plaintiff has admitted his signatures in all twelve pages of Ex. B1-unregistered Partition Deed, the genuineness of Ex. B1 cannot be doubted.

14. After extracting the oral evidence, Trial Court took the view that Ex. B1 cannot be looked into for any purpose mainly on two grounds viz., (i) u/s 17 of Indian Registration Act, Partition Deed is compulsorily registrable and Ex. B1 being unregistered document cannot be looked into; and (ii) u/s 49 of Indian Registration Act, an unregistered document shall not be admitted in a Court of law. Since Ex. B1 is an unregistered document, the contents of Ex. B1 shall not be looked into.

15. Placing reliance upon A.C. Lakshmipathy and another v. A.M. Chakrapani Reddiar and five others, 2001 (1) CTC 112; and Jansirani and others v. G. Loganathan and others, 2007 (4) MLJ 485, learned Senior Counsel for Appellants contended that unregistered Partition Deed can be looked into for collateral purpose of finding whether there was division in status or not.

16. In A.C. Lakshmipathy and another v. A.M. Chakrapani Reddiar and five others, 2001 (1) CTC 112, the Division Bench of this Court elaborately considered the family arrangement/unregistered partition. After referring to relevant provisions from Indian Registration Act, 1908 and Stamp Act, 1899 as

well as the decisions of the Supreme Court and also the earlier decisions of this Court, the Division Bench held as under:

42. To sum up the legal position:

(i) A family arrangement can be made orally.

(ii) If made orally, there being no document, no question of registration arises.

(iii) If the family arrangement is reduced to writing and it purports to create, declare, assign, limit or extinguish any right, title or interest of any immovable property, it must be properly stamped and duly registered as per the Indian Stamp Act and Indian Registration Act.

(iv) Whether the terms have been reduced to the form of a document is a question of fact in each case to be determined upon a consideration of the nature of phraseology of the writing and the circumstances in which and the purpose with which it was written.

(v) However, a document in the nature of a Memorandum, evidencing a family arrangement already entered into and had been prepared as a record of what had been agreed upon, in order that there are no hazy notions in future, it need not be stamped or registered.

(vi) Only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess.

(vii) If the family arrangement is stamped but not registered, it can be looked into for collateral purposes,

(viii) Whether the purpose is a collateral purpose, is a question of fact depends upon facts and circumstances of each case. A person can not claim a right or title to a property under the said document, which is being looked into only for collateral purposes.

(ix) A family arrangement which is not stamped and not registered cannot be looked into for any purpose in view of the specific bar in Section 35 of the Indian Stamp Act.

17. In Venkatachala Moopar (died) and others v. Balasubramanian, 2001 (1) TLNJ 191; and K: Pattabiraman v. K. Banumathi and four others, 2001 (3) CTC 328, the Single Judges of this Court held that "unregistered document though cannot be the basis for proving title can be looked into for deciding the nature and character of possession".

18. In the light of the above principles let us consider the admissibility/evidentiary value to be attached to Ex. B1. Ex. B1-Partition Deed though not registered can be looked into for collateral purpose of division in status and also

for considering the nature and character of possession. While the Trial Court erred in declining to look into the contents in Ex. B1-unregistered Partition Deed, in our considered view, the contents of Ex. B1 could be looked into for "collateral purpose" of proving division in status and the subsequent separate enjoyment of the parties. To that extent, the finding of the Trial Court as to the value to be attached to Ex. B1-unregistered document is liable to be set aside.

19. Having said that contents of Ex. B1 could be looked into, the points falling for consideration is whether there was fair partition and whether division in status already effected is to be re-opened.

20. Case of Appellants is that both 1st Respondent-Plaintiff and 1st Appellant-Defendant are in separate possession and enjoyment of the properties and that there was mutation of revenue records. In C.M.P. No. 159 of 2012, Appellants have produced Chitta and Adangal for fasali 1407 and 1408 standing in the name of 1st Appellant-Defendant [Venkatasubramaniya Chettiar] and 6th Respondent-Jeyachandran [son of 1st Appellant-Defendant] as under:

Appellants have also produced Chitta and Adangal for Fasali 1407 standing in the name of Nagesh [son of Plaintiff] for S. Nos. 119/8, 128/8. 137/3, 6, 9, 148/11, 154/1A, 3 of Thottapadi village and S. Nos. 245/7, 248/4, 6, 12, 14-B & 257/3, 7A of Pandiyankuppam village. All those Chitta and Adangal are issued by the Village Administrative Officer. The proper documents that could be received and marked are certified copy of Chitta and Adangal obtained from the Tahsildar concerned.

21. Further case of Appellants is that in pursuance of division in status, 1st Respondent-Plaintiff has been in separate possession and enjoyment of the properties allotted to him and 1st Respondent-Plaintiff is said to have sold some of the items of properties so allotted to him under four Sale Deeds dated 15.9.1998. In his evidence, 1st Respondent-Plaintiff has also admitted having sold some of the items of properties under those Sale Deeds. In C.M.P. No. 159 of 2012, the registration copy of those Sale Deeds have been produced. By perusal of those sale deeds, it is seen that 1st Respondent-Plaintiff has sold various items of suit properties allotted to him under Ex. B1-Partition Deed as under:

22. To substantiate the plea of separate possession and enjoyment of the 1st Respondent-Plaintiff, Appellants have produced various additional documents. Under Order 41, Rule 27, C.P.C., additional evidence shall not be allowed in Appellate Court, unless one of the following conditions is satisfied viz.,-

i. improper refusal of evidence by Trial Court which ought to have been admitted, or

ii. non-production of evidence notwithstanding exercise of due diligence, or

iii. requirement of the Appellate Court itself for pronouncing judgment, i.e. impossibility to pronounce judgment without the additional evidence, or

iv. any other substantial cause.

23. Registration copy of Sale Deeds and Chitta and Adangal sought to be produced as additional evidence are public documents having bearing on the merits of the case and very much relevant for arriving at just decision. Even though the documents were not produced in the Trial Court, for rendering substantial justice between the parties, the additional evidence need to be admitted.

24. We are conscious that unsuccessful party should not be allowed to fill up lacunae and should not be allowed to fill up omissions. Provisions of Order 41, Rule 27, C.P.C are not intended to be invoked to allow a litigant who had been unsuccessful in the Trial Court to patch up the weak points.

25. As pointed out earlier, additional documents produced are relevant for determination of the Issues arising between the parties. Parties did not seem to have grasped the significance of producing the documents in the Trial Court. In such circumstances, additional evidence cannot be refused on the ground that they did not produce it in the Trial Court. As discussed earlier, decision of the Trial Court on the preliminary point of Ex. B1-unregistered Partition Deed has been set aside. Since the Trial Court did not look into Ex. B1-unregistered Partition Deed, Trial Court did not analyse the oral evidence adduced by the parties. Additional documents produced are sale deeds, Chitta and Adangal issued by the Village Administrative Officer concerned. Trial Court has not recorded its finding on the other points raised by the Defendants. Considering the additional evidence produced, it is appropriate that the judgment of the Trial Court is to be set aside and the matter is to be remitted back to the Trial Court.

26. Ofcourse, the Suit is the of year 1999. 1st Appellant-Defendant died and the 1st Respondent-Plaintiff is a senior citizen aged about 72 years. However, in the interest of justice and to render substantial justice between the parties, the matter is remitted back to the Trial Court. For the foregoing reasons, the judgment and decree of the Trial Court in O.S. No. 6 of 2002 dated 25.2.2003 is set aside and the Appeal is allowed and the matter is remitted back to the Trial Court. Trial Court shall afford sufficient opportunity to both parties to adduce further oral and documentary evidence and proceed with the matter afresh in the light of our finding on Ex. B1-unregistered Partition Deed. Insofar as the additional documents produced before this Court in C.M.P. No. 159 of 2012, we have not expressed any opinion. Additional documents filed along with C.M.P. No. 159 of 2012 are directed to be returned to the Appellants, so as to enable them to produce before the Trial Court. Considering the age of the 1st Respondent-Plaintiff and other circumstances, Trial Court is directed to take up the matter and dispose of the same at an early date.

Consequently, connected M.P. is closed. However, there is no order as to costs in this Appeal.