
(2011) 02 MAD CK 0435

In the Madras High Court

Case No : S.A. No. 801 of 2009 and M.P. No. 1 of 2011

Venni @ Vennila

APPELLANT

Vs

Smt. Jenova and Jayakumar

RESPONDENT

Date of Decision : 25-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Transfer of Property Act, 1882 — Section 44

Citation : (2011) 02 MAD CK 0435

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : R. Thiagarajan, for the Appellant; P. Vijaya Gandhi, for R1 and S. Baskaran, for R2, for the Respondent

Judgement

G. Rajasuria, J.—This second appeal is focused by the first Defendant, inveighing the judgment and decree dated 27.10.2004 passed by the Additional District and Sessions Judge, Fast Track Court-III, Chennai confirming the judgment and decree dated 30.8.2000 passed by the XVII Asst. Judge, City Civil Court, Madras, in O.S. No. 2227 of 1998, which was filed for partition and permanent injunction.

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. Narratively but precisely, broadly but briefly the relevant facts absolutely necessary and germane for the disposal of this second appeal would run thus:

(a) The first Respondent herein, as Plaintiff, filed the suit seeking the following reliefs:

to pass judgment and decree

i). Directing the 2nd and 3rd Defendants to divide the Schedule mentioned property in three equal shares bearing door No. 4, Solai Street, Ist lane, Ayanavaram, Chennai-600 023, which has been more fully described in the

schedule hereunder and allot 1/3rd share to the Plaintiff in the front portion and separate possession to the Plaintiff;

ii) For a permanent injunction restraining the Defendants, their men, servants, agents or any one on behalf of the Defendants in any manner from interfering with the peaceful possession and enjoyment of the suit property.

iii) To appoint an Advocate Commissioner to effect the partition in the suit property with metes and bound;

iv) To direct the Defendants to pay the cost of this suit.

(extracted as such)

(b) Written statement was filed by D1, resisting the suit. Whereupon, the trial Court framed the issues.

(c) On the side of the Plaintiff, she examined herself as P.W.1 and marked Exs.A1 to A5. On the Defendants' side, the 1st Defendant examined himself as D.W.1 along with D.W.2 and D.W.3 and marked Exs.B1 to B6.

(d) During the pendency of the proceedings, D2 died, whereupon the trial Court ultimately decided the suit allotting half share in favour of the Plaintiff.

(e) Being aggrieved by and dissatisfied with the same, D1 and D3 filed the first appeal challenging and impugning the judgment and decree of the trial Court. However, the first appellate Court dismissed the appeal confirming the judgment and decree of the trial Court.

4. Animadverting upon the Judgments and decrees of the Courts below, the second appeal has been focussed by D1 on various grounds inter alia thus:

(i) The Courts below failed to take into account the evidence adduced on the side of the Appellant/D1 and also the fact of D2 and D3 having executed the sale deed dated 15.7.1994 in favour of D1.

(ii) The factum of the mortgage, over the suit property having been discharged by D1 also was not considered by the Courts below.

5. Accordingly the following substantial questions of laws are found suggested in the memorandum of grounds of second appeal.

i) Whether the Courts below are right in entertaining the suit for partition filed by the original Plaintiff, viz., 1st Respondent herein when she herself has admitted about the agreement for sale in respect of the suit property in favour of the Appellant along with her father and brother who had subsequently executed and registered a Deed of Sale on 15.7.94 in favour of the Appellant herein and in such circumstances, the property having been dealt with by the heirs of late Pushpavathi, whether the conclusion reached by the trial Court as well as the appellate Court that the property is available for partition and separate possession and declaring the Plaintiff's 1/3 share by the trial Court, which has

been enlarged into half share by the appellate Court, are perverse, unsound, unsustainable and untenable in law and on facts?

ii) Whether the Courts below are right in entertaining the suit for partition in the absence of a declaration that the Sale deed dt. 15.7.2004 executed in favour of the Appellant herein is illegal, invalid and non-est in the eyes of law?

iii) Whether the Courts below are right in granting a decree for partition in the absence of a prayer for setting aside the sale made in favour of the Appellant?

iv) Whether the Courts below are right in granting a blanket decree for partition without reference to the rights of the Respondents 2 & 3 who have not chosen to challenge the alienation made in favour of the Appellant?

v) Whether the Courts below are right in granting a decree when the original Plaintiff having lost possession of the property is entitled to seek for the relief of injunction on the date of institution of the suit and the grant of a decree for injunction is against the teeth of the provisions contained u/s 44 of the Transfer of Property Act in the light of the Sale deed 15.7.1994 and there cannot be a 6 decree for injunction as against a co-owner as had been laid down in 1990 Supreme Court Page No. 867 in the case of Durab Cawasji Warden (Appellant) v. Cooini Sorab Warden and Ors. (Respondents).

(extracted as such)

6. Based on the available materials, my learned predecessor framed the following substantial question of law for consideration.

When the Defendants 2 and 3 have executed Ex.B6 sale agreement in favour of the first Defendant though in respect of entirety of the suit property when admittedly, the second and third Defendants have got 1/3rd share each in the suit property and as such, they are entitled to execute the valid sale deed in respect of their respective shares, whether the Courts below are right in not considering the same and granting a decree for 1/2 share in favour of the Plaintiff? (extracted as such)

7. During the pendency of the second appeal, M.P.1 of 2011 was filed by the Appellant/D1 seeking permission to adduce additional evidence by filing the following documents:

Sl. No.	Date	Description of documents	Nature of documents
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1	15.7.1994	Sale Deed executed by S.Murugesan and another in favour of Venni	Original
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2	11/3/87	Mortgage deed executed by S.Murugesan and another in favour of the Madras City Co-operative Housing Society Ltd	Original
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3	27.7.1993	Deed of receipt issued by the Madras City Cooperative Housing Society Ltd.in favour of Pushpavathy referred as the Mortgagor	Original
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4 24.10.1985 Building plan issued by Corporation of Chennai Original

5 14.9.1998 Death Certificate of S.Murugesan Original

6 20.11.1987 Legal heir certificate of M.Pushpavathy Original

7 - Property Tax receipts (series) in the name of Venni Original

8 - Property Tax Demand notice issued by the Corporation of Chennai in the name of Venni

8. Counter affidavits have been filed by both R1 and R2 herein objecting to the filing of such additional documents on the main ground that there were latches on the part of the Appellant/D1 in filing such documents.

9. Heard both sides.

10. The learned Counsel for the Appellant/D1 would submit that D2-the father and D3-the son both executed the sale deed 15.7.1994 in favour of D1 and in fact, anterior to that sale deed, an agreement to sell emerged, wherein, the Plaintiff, D2 and D3 were parties and executed it in favour of Plaintiff agreeing to sell the suit property, however, at the time of getting the sale deed registered, the Plaintiff even though received her share of the sale consideration, did not come forward to sign, whereupon the sale deed was constrained to be registered with the help of D2 and D3, covering the whole suit property and all these facts were not taken into consideration by the Courts below.

11. After execution of the sale deed by D2-the father relating to his share, the question of D2's share, consequent upon his death, devolving upon his daughter-the Plaintiff and his son D3 would not arise, but without considering this crucial point, the Courts below simply allotted half share in favour of the Plaintiff, warranting interference in second appeal.

12. Placing reliance on M.P. No. 1 of 2011, the learned Counsel for the Appellant/D1 would implore and entreat that absolutely it is necessary to entertain the documents found set out therein, as those documents are crucial to place the whole truth before the Court.

13. Per contra, the learned advocates for the R1/Plaintiff and R2/D2 would submit that the additional documents cannot holus-bolus be entertained before the second appellate Court and thereby, convert the second appellate Court into a trial Court and such a course is not permissible. They would also submit that the Courts below appropriately and correctly decided the lis, warranting no interference in second appeal.

14. At the outset itself I would like to fumigate my mind with the following decisions of the Honourable 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.

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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-recognised 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) (2006) 5 Supreme Court Cases 545 - *Hero Vinoth (Minor) v. 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*:

15. A bare perusal of the above precedents would exemplify and demonstrate that if there is any perversity or illegality or when there is mistake on the part of the Courts below in mis-reading of evidence or misapplication of law or not entertaining any evidence, the High Court has to necessarily interfere.

16. Here, in the written statement of D1, in detail the facts were not set out, even though there are certain facts found narrated relating to the sale deed dated 15.7.1994 having been executed by D2 and D3 in favour of D1. Axiomatically and obviously, however, it appears, inadvertently, the said sale deed itself was not filed before any of the Courts below and it appears to be an apparent mistake on the part of D1 in not doing so. By no stretch of imagination it could be stated that the sale deed is not at all relevant to this case. It is absolutely necessary. Furthermore, the mortgage deed dated 11.3.1987 executed by D2 and D3 and the wife of D2, in my opinion is also relevant for deciding comprehensively the lis. The 3rd document, viz., the deed of receipt dated 27.7.1993 is a document relating to the second document, referred to supra. The other documents also are related to the facts of this case and one cannot hold that those are all totally irrelevant to this case.

17. Now the question arises as to whether for the first time those documents

could be allowed to be filed at the appellate stage.

18. I recollect the relevant provisions Order 41 Rule 27 read with O.42, Rule 1 and Section 100 of C.P.C.

19. A bare perusal of the above provisions would demonstrate and convey that even at the second appellate stage additional documents could be entertained, then as a sequel, the consequences should be visualized.

20. After permitting the Appellant/D1 to file additional documents, necessary opportunity has to be given to the other side also to rebut such evidence and unilaterally without the consent of the other side relating to marking of the documents, the Court cannot suo motu mark and dispose of the appeal and that would be amounting to non adherence to the principle of audi alteram partem.

21. I recollect the maxim "Judicis est judicare secundum allegata et probata" - It is the duty of a judge to decide according to facts alleged and proved.

22. Any amount of evidence without the backing of pleadings cannot be countenanced. As such, while considering the additional evidence, necessarily this Court has to see as to whether additional pleadings also are required. Here it is a case of such a nature that both the parties should also be given opportunity to put forth their additional pleadings, touching upon those documents, which are hereby held to be very much relevant for comprehensively deciding the lis.

23. I recollect the following maxim: Boni judicis est lites dirimere, ne lis ex lite oriat, et interest reipublicae ut sint fines litium -It is the role of a good Judge to dispose of litigations so that one suit should not grow from another, as it concerns the welfare of the State.

24. The first appellate Court itself, being the last Court of fact, could have directed the parties concerned to do the needful. No doubt, the first appellate Court simply remarked that sufficient evidence was not placed before the Court. In the interest of justice, if the Court feels that the evidence placed before it is, tenuous, weak, meek and bleak, despite the party concerned is perceived to be in possession of sufficient evidence, the Court itself has got the power suo motu to direct the parties concerned to produce such documents, but that was not done so.

25. Indubitably and indisputably, so far this case is concerned, D2-the father and D3-the son and the Plaintiff-the daughter all had shares in the suit property and it is the contention of D1 that in the agreement to sell all those three owners joined together and executed the agreement to sell and received the amount also. Subsequently, it is the Plaintiff, who turned turtle and had a volte face. If the sale deed is held to be valid, certainly the Plaintiff would not be entitled to half share and certainly her share would got dwindled and curtailed. In such a case, I am of the considered view that the first appellate Court being the last Court of fact should necessarily once again consider all these facts.

26. Accordingly, the substantial question of law is answered to the effect that based on evidence, the first appellate Court was not justified in passing the judgment and decree, which are liable to be set aside and accordingly set aside. M.P. No. 1 of 2011 stands allowed permitting the Appellant/D1 to file in Court the documents found set out therein subject to proof, admissibility and relevancy. Accordingly, the matter is remanded to the first appellate Court for the said purpose.

27. The parties shall appear before the first appellate Court on 10.3.2011. D1 is also given opportunity to file additional written statement. Whereupon, the Plaintiff and D3 are also given opportunity to file reply. Whereupon additional issue shall be framed and both sides shall be given opportunity to adduce oral and documentary evidence and the first appellate Court shall make endeavours to see that the matter is disposed of before the end of April 2011.

28. The second appeal and the Miscellaneous petition are disposed of accordingly. However, there is no order as to costs.