

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.11.2016

PRONOUNCED ON : 16.11.2016

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.131 of 2008

S.Venkatachalam ..Appellant/Appellant/1st Defendant

Vs

1.Saradambal ..1st Respondent/1st Respondent/
Plaintiff

2.Kannammal

3.Rathina

4.Maragatham

5.Mohana Ramakrishnan

(Respondents 2to5 herein given up)

..2 to 5 Respondents/2to5 Respondent
/3to6 Defendants

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 19.09.2007 made in A.S.No.1 of 2007 on the file of the learned Principal District Judge, Erode confirming the judgment and decree dated 18.09.2006 made in O.S.No.335 of 1999 on the file of the learned II Additional Subordinate Judge, Erode.

For Appellant : Mr.T.Muruga Manikkam

For R.1 : Mr.N.Manokaran

For RR2 to 5 : Given up

JUDGMENT

The plaintiff is one of the four sisters of the first defendant. She is the youngest of the lot who got married on 07.06.1989. Mr.Chinnappa Gounder and Mr.Sengoda Gounder are the sons of Mr.Kolandaiyanna Gounder. The suit properties along with other properties were the shares allotted to Mr.Sengoda Gounder in the partition held between Mr.Chinnappa Gounder and Mr.Sengoda Gounder vide partition deed dated 12.05.1981, which is Exhibited on the side of the defendants as Ex B-3. The plaintiff Mrs.Saradhambal claims that the suit properties are ancestral properties traced from her grand father

Mr.Kolandaiyanna Gounder, even after the partition among his sons namely Mr.Chinnappa Gounder and Mr.Sengoda Gounder, it retains the nature and character of joint family property. Whatever earned and added were blended to the hotpoch of the joint family property. At the time when the amendment to Hindu Succession(Amendment) Act 1 of 1990 came into force, the plaintiff was unmarried. Therefore, she is entitled to 1/3rd share of her father's property along with her brother.

2.The first defendant claims that, Mr.Kolandaiyanna Gounder released his share over the property to his sons Mr.Chinnappa Gounder and Mr.Sengoda Gounder on 14.06.1966 (Ex B-1) for consideration. Thereafter, partition took place between the brothers on 12.05.1981. Thus, the suit properties have lost the character of both ancestral properties and joint family properties. It has been enjoyed by Mr.Shengoda Gounder absolutely till his life time. By virtue of the Will dated 31.03.1993 (Ex B-5), executed by his father Mr.Shengoda Gounder, on his demise, the first defendant is in possession of the suit properties.

3.The trial court after framing as many as 5 issues touching upon the proposition of law and facts traversed by the parties examined the parties and allowed the suit for partition holding that the properties allotted to Mr.Sengoda Gounder through partition deed, were joint family ancestral properties and absolutely there is no basis to hold that after partition in the year 1981, at the hands of Mr.Sengoda Gounder, the suit properties lost its character of ancestral properties.

4.In respect of the registered Will dated 31.03.1993, propounded by the first defendant, the trial court had compared the signatures of the attesting witness (D.W-2) found in the Will - Ex B-5 dated 31.03.1993 and in his proof affidavit, dated 24.02.2003, filed in lieu of examination-in-chief and held that there is remarkable difference between those two. The trial court has rejected the evidence of the attesting witness, as it does not inspire the confidence. The first appellate court had confirmed the judgment of the trial court, leading to the second appeal by the first defendant.

5.Apart from the questions of law formulated during the admission of the second appeal, the Learned counsel filed memo to receive the following additional substantial questions of law for consideration.

"1).When a member of a joint family releases his share in favour of other coparceners for consideration, will this transaction not amount to a conveyance,

thereby becoming the separate properties of the releases ?

2).Whether the judgment of the lower Appellate Court is vitiated in that as a final Court of fact, it has not independently come to any conclusion, but, has proceeded to hold that the Trial Court has correctly rendered findings, which do not warrant interference ?”

6.After hearing the respective counsel for the appellant and the respondents, this court has decided to remand the matter back to the first appellate court since, the first appellate court while confirming the judgment and decree of the trial court has miserably failed to adhere to the ingredients of Order 41 Rule 31 of Civil Procedure Code.

Reasons for remand:

Two crucial points are involved in the above suit for partition. First, whether the properties are ancestral properties and jointly enjoyed by the family members or absolute properties of Mr.Sengoda Gounder. Next, whether the Will of Mr.Sengoda Gounder is genuine.

7.The decision on these two points either way Will have a bearing on the right as well as the proportion of share over the suit properties. If the properties are held to be independent and absolute property of Mr.Sengoda Gounder and the Will executed in favour of the first defendant is accepted as genuine, the plaintiff will have no share in the suit properties. If the properties are held to absolute property of Mr.Sengoda Gounder and his Will is held to be in-genuine the plaintiff will be getting some share in the suit properties. If the suit properties are held to be ancestral properties and the Will is held to to be genuine or not, the plaintiff will be getting a larger share with different proportion based on the proof of the Will.

8.While so, on appeal, the first appellate court had failed to appraise the evidences independently, to decide the questions of fact and law such as;

(i)The character of the properties after blending of self acquired properties into the ancestral properties;

(ii)The character of a deed executed on receipt of consideration but carry the nomenclature of release deed, and

(iii)The probity of the Court making comparison of signatures through naked eyes to disbelieve the witness when admittedly, the accepted and disputed signatures were not made contemporaneously. Instead, after extracting the gist of the pleadings and trial court judgment, the first appellate court has just observed that, "it is stated that the properties belong to the brothers by ancestrally and self acquired, they effected a partition. Accordingly, it is proved that ancestral properties were partitioned between Mr.Sengoda Gounder and his brother Mr.Chinnappa Gounder."

9.Similarly, for the point about the genuineness of the Will Ex B-5, after extracting the portion of the judgment of the trial Court including the citations, the first appellate court has traversed tangentially saying "as per the Hindu Law, the joint family property cannot be bequeathed by Will by a co-parcener and without the consent of the other co-parceners. In the present case, there is no evidence that the Will was executed with the consent of the plaintiff. Accordingly, the defendants 1 and 2 have not proved Ex.B-5 in accordance with law."

10.The first appellate court should have assigned its reason for deciding why the suit properties are to be treated as ancestral joint family properties even after its division by way of partition among the brothers. Further, proof of execution of Will cannot be confused with competency of the testator to bequeath the properties mentioned in the Will. The first appellate court ought to have determined, whether the Will Ex B-5 is genuine or not and whether it was proved in the manner known to law. Instead, on the premise that Mr.Sengoda Gounder is not competent to execute the Will in respect of co-parcener property without the consent of other co-parceners, he has rejected Ex B-5.

11.Order 41 Rule 31 of C.P.C., mandates the appellate judge to state in his judgment;

- a) the point for determination;
- b) the decision thereon;
- c) the reasons for the decision and
- d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

12.In B.V.Nagesh and others -vs- H.V.Sreenivasa Murthy reported in 2010 (5) CTC 719, while dealing with this point, the Hon'ble Supreme Court has held that,

"The Appellate Court has jurisdiction to reverse or affirm the findings of the Trial Court. The First Appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of fact and law. The judgment of the Appellate Court must, therefore, reflect its conscious application of mind nad record findings supported by reasons, on all the issues arising along with the contentions put-forth and pressed by the parties for decision of the Appellate Court. Sitting as a Court of Appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.

The First Appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the First Appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings (vide Santosh Hazari v. Purushottam Tiwari, 2001 (3) SCC 179 and Madhukar and Others v. Sangram and Others, 2001 (4) SCC 756)"

The same preposition of law has been expressed differently by the Hon'ble Supreme Court its latter judgment in H.Siddiqui (dead) by its LR's -vs- a.Ramalingam reported in 2011 (4) CTC 343 as below:-

"18.The said provisions provide guidelines for the Appellate Court as to how the Court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the Appellate Court that the Court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance of the said

provisions if the Appellate Court's judgment is based on the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the Appellate Court are well founded and quite convincing. It is mandatory for the Appellate Court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final Court of fact, the First Appellate Court must not record mere general expression of concurrence with the Trial Court judgment rather it must give reasons for its decision on each point independently to that of the trial Court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the Court must proceed in adherence to the requirements of the said statutory provisions. (vide Thakur Sukhpal Singh v. Thakur Kalyan Singh & Anr., AIR 1967 SC 1124; Girijanandini Devi & Ors., V. Bijendra Narain Choudhary, AIR 1967 SC 1124; G.Amalorpavam & Ors., V. R.C.Diocese of Madurai & Ors, 2006 (3) SCC 224; Shivkumar Sharma v. Santhosh Kumari, 2007 (5) CTC 453 (SC) : 2007 (8) SCC 600; and Gannmani Anasuya & Ors v. Parvatini Amarendra Chowdhary & Ors., AIR 2007 SC 2380) "

13.In the light of the above two judgments of the Hon'ble Supreme court, if the appellate court judgment is scrutinized, we find only the reasons of the trial court is extracted. No independent appraisal of evidence by the first appellate court and no independent reasons for the decision could be found. Except recording general expression of concurrence with the trial court adding few observations, which are only superficial, this Court finds a total non application of mind by the first appellate court to the vital points which were raised for its consideration. Therefore the judgment of the first appellate court is liable to be set aside.

14.In the result, the second appeal is allowed. The judgment and decree of the first appellate court is set aside. The matter is remanded back to the first appellate court for fresh

consideration in accordance with Order 41 Rule 31 C.P.C., as expeditiously as possible, uninfluenced by any of the observations made above. There shall be no order as to costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

jbm

To

1.The II Additional Subordinate Judge,
Erode.

2.The Principal District Judge,
Erode.

+1cc to Mr.T. Murugamanickam, Advocate, S.R.No.66507

+1cc to Mr.N. Manokaran, Advocate, S.R.No.66436

RJ(CO)
EU 24.1.17

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