

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 11.04.2018
Judgment pronounced on : 28.04.2018

CORAM

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE MR.JUSTICE P. RAJAMANICKAM

O.S.A.No.303 of 2017
and
CMP.No.18809 of 2017

1.A. Ramanathan
2.RM. Avadiappan
3.RM. Thirupathi

... Appellants

Vs.

1.Sukumaran Baskaran
2.Ravikumar Baskaran
3.R. Sumathi
4.Anithalakshmi Arunachalam Baskaran
5.Sethulakshmi Baskaran
6. Aru. Meena a.k.a.A.R.Meenakshi

... Respondents

Prayer : Original Side Appeal is filed under Order XXXVI Rule 1 of the O.S.Rules against the Fair Order and Decreetal Order dated 20.09.2017 passed in Appln.No.2020 of 2017 in C.S.No.535/2014

For Appellants : Mr.S. Parthasarathy
Senior Counsel
for M/s.J. Ramakrishnan
& Suhrith Parthasarathy

For Respondents : Mr.K.C. Ramamurthy (for R1 to R4)
No appearance (for R5 and R6)

JUDGMENT

[Judgment of the Court was made by P.RAJAMANICKAM.,J.]

This appeal has been filed by the applicants/defendants 1, 4 and 5 against the order passed by the learned Single Judge in application in A.No.2020 of 2017 in C.S.No.535 of 2014 dated 20.09.2017.

2. The respondents 1 to 4 herein have filed a suit in C.S.No.535 of 2014 to declare that the partition deed dated 27.12.1973 (Doc.No.2303/1973, SRO, Mylapore) is not binding on

the parties in the suit in so far as the suit property is concerned; to divide the suit property into 9 equal shares and allot 4 such shares to the plaintiffs 1 and 2 and 4 shares to the plaintiffs 3 and 4 or one-third share to the defendants 1 to 3 each; or in the alternative to declare that by virtue of the settlement deed dated 16.09.1964 (Doc.No.1391/1964 SRO, Mylapore, Chennai) that the second defendant is the absolute owner of one-third share in the suit property and the third defendant is the absolute owner of the one-third share in the suit property and to direct the defendants 1, 4 and 5 to render accounts for income and profits from the suit property and for permanent injunction restraining the defendants 1, 4 and 5 from alienating or encumbering the suit property.

3. After receipt of the summons, the defendants 1, 4 and 5 have filed written statement. Subsequently, they have filed an application to receive additional written statement and that was allowed and thereafter, the plaintiffs also filed reply statement. After considering the pleadings, issues also have been framed and the suit has been posted for trial. At that stage, the defendants 1, 4 and 5 have filed an application under Order VII Rule 11 CPC in A.No.2020/2017 to reject the plaint. The learned Single Judge has dismissed the said application by the order dated 20.09.2017. Aggrieved by the same, the defendants 1, 4 and 5 have filed the present appeal. For the sake of convenience, the parties are referred to as described in the suit.

4. We shall refer to the facts of the case as set out in the plaint.

Plaintiff's grandfather Rm.Avadiappa Chettiar was born in the year 1909. Mrs.A. Alagammai Achi was his first wife and Lakshmi Ammal was his second wife. The first defendant is the son of the said A. Alagammai Achi. Lakshmi Ammal had two daughters viz., Sethulakshmi (second defendant) and A.R.Meenakshi (third defendant). The plaintiffs 1 and 2 are the sons of the second defendant. The plaintiffs 3 and 4 are the daughters of the third defendant.

5. The plaint then states that the plaintiffs understand that in the year 1940, the said Lakshmi Ammal had purchased the suit property, but they could not get the copy of the said sale deed inspite of the diligent efforts. The said Lakshmi Ammal died in the year 1956. At the time of her death, her daughters, the defendants 2 and 3 were minors aged about 14 years and 7 years respectively. On her death, her husband Rm.Avadiappa Chettiar and her daughters viz., defendants 2 and 3 got one-third share each in the said property. However, the said Rm.Avadiappa Chettiar had executed a deed of settlement dated 16.09.1964 (Doc.No.1391/1964, SRO, Mylapore, Chennai) by which, he settled the suit property in favour of the defendants 1 to 3 one-third share each, retaining life interest.

6. The plaint further states that the said Rm.Avadiappa Chettiar died on 15.05.1970 and hence, as per the settlement deed dated 16.09.1964, the defendants 1 to 3 are each entitled to get one-third share in the suit properties. While so, the first defendant misrepresented and misled the defendants 2 and 3 that they had no legal right in the suit properties and fraudulently usurped their shares by inducing them to sign in a partition deed dated 27.12.1973 (Doc.No.2303/1973, SRO, Mylapore, Chennai). By the said partition deed, the first defendant induced the defendants 2 and 3 to release and relinquish their shares in the suit property in his favour, by showing a meagre payment. The said partition deed was executed by the first defendant for himself and as the guardian of the defendants 4 and 5, A. Alagammai Achi (mother of the first defendant) and the defendants 2 and 3. The said A. Alagammai Achi died in the year 2000. The said partition deed is illegal, null and void and not binding on the defendants 2 and 3. Even if it is assumed that the defendants 2 and 3 are bound by their act in releasing their share in the suit property in favour of the first defendant, the same in any event is not binding on the plaintiffs, as the defendants 2 and 3 had no right to surrender the plaintiffs' rights in the suit properties, which they inherited from their mother Lakshmi Ammal. The said property, being ancestral property, the alleged release of their shares by the defendants 2 and 3, is not binding on the plaintiffs.

7. The plaint also states that the plaintiffs were not aware of anything with regard to the said property and the fraud committed by the first defendant in depriving the defendants 2 and 3 of their legitimate shares in the suit property till recently. Only in the month of May/June 2013, when the plaintiffs were thinking of buying a small flat in Chennai, they came to know through the third defendant about the fraudulent act and misrepresentation of the first defendant. Hence, immediately they have filed a suit for the aforesaid reliefs.

8. As already stated that the defendants 1, 4 and 5 have filed a written statement and also additional written statement. The plaintiffs also filed reply statement and based on the averments made in the plaint, written statement and additional written statement, issues also have been framed and the suit has been posted for trial. At that stage, the defendants 1, 4 and 5 have filed an application under Order VII Rule 11 C.P.C., in A.No.2020 of 2017 to reject the plaint.

9. According to the defendants 1, 4 and 5, the suit property was originally purchased by the said Rm.Avadiappa Chettiar and the said Rm.Avadiappa Chettiar died intestate on 15.05.1970 leaving behind the defendants 1 to 3 and first defendant's mother viz., A. Alagammai Achi as his legal heirs.

They have further stated in their application that the defendants 2 and 3 are the daughters of the second wife viz., Lakshmi Ammal, who pre-deceased the said Rm.Avadiappa Chettiar in the year 1956. The plaintiffs 1 and 2 are the sons of the second defendant. The plaintiffs 3 and 4 are the daughters of the third defendant. The defendants 2 and 3 and the mother of the first defendant under the partition deed dated 27.12.1973, have relinquished their respective shares in the suit property in favour of the first defendant for a consideration of Rs.80,000/- each. Since the defendants 2 and 3 have not challenged the said partition deed dated 27.12.1973, till date, no right to sue has accrued to the plaintiffs, who only claimed as the legal heirs of the defendants 2 and 3. The plaintiffs, not being party to the said deed of partition dated 27.12.1973, lacking the locus standi to maintain the present suit. The plaintiffs have no cause of action against the defendants 1, 4 and 5 and the plaint does not disclose any cause of action. Their further case is that the suit for declaration of the partition deed dated 27.12.1973 as null and void ought to have been filed within three years, but the suit was filed in the year 2014 and as such, the suit is hopelessly barred by limitation and therefore, the plaint has to be rejected on the ground that plaint does not disclose cause of action and the suit is barred by law.

10. The plaintiffs resisted the said application by filing counter. According to them, the defendants 1, 4 and 5 have already filed written statement and additional written statement; and that the plaintiffs have filed reply statement; and that issues also have been framed and suit has been posted for trial and at that stage, the application filed by the defendants 1, 4 and 5 to reject the plaint has to be dismissed in limine. Their further case is that the first defendant has deliberately suppressed the fact that as per the sale deed dated 03.08.1950 the suit property belonged to Lakshmi Ammal absolutely and wilfully made a false representation that the suit property belonged to Hindu undivided family consisting of himself and his father Rm.Avadiappa Chettiar and hence, it is a clear case of fraud played by the first defendant. Their further case is that as per Section 17 of the Limitation Act, 1963, in the case where the suit is based upon the fraud of the defendant, the period of limitation shall not begin to run until the plaintiff has discovered the fraud. Their further case is that they have elaborately stated in the plaint, how the first defendant has played fraud on the defendants 2 and 3. Their further case is that the plaintiffs are having cause of action to file the suit and hence, the aforesaid application has to be dismissed.

11. The learned Single Judge, after considering the plaint averments and the rival submissions, has dismissed the said

application. Aggrieved by the same, the defendants 1, 4 and 5 have filed the present appeal.

12. Heard Mr.S.Parthasarathy, learned Senior Counsel assisted by Mr.J.Ramakrishnan, learned counsel for the appellants and Mr.K.C.Ramamurthy, learned counsel for the respondents 1 to 4.

13. The points for consideration are as follows:

(1) whether the plaint does not disclose cause of action?

(2) whether the suit is barred by any law?

(3) whether this appeal has to be allowed?

14. Point Nos.1 and 2:-

Mr.S.Parathasarathy, learned Senior Counsel has contended that as per the partition deed dated 27.12.1973, the defendants 2 and 3 have relinquished their respective shares in the suit property in favour of the first defendant for a consideration of Rs.80,000/- each and as such, the said partition deed will bind upon the defendants 2 and 3. He further contended that the defendants 2 and 3, till date, have not challenged the said partition deed and that being so, it is not open to the plaintiffs, who are the daughters and sons of the defendants 2 and 3, to challenge the validity of the said partition deed. He further contended that even as per the plaint averments that the suit property was purchased by the mother of the defendants 2 and 3 viz., Lakshmi Ammal and in such a case, during life time of the defendants 2 and 3, the plaintiffs cannot claim any right over the suit property. He further contended that the property owned by a Hindu female cannot be treated as ancestral property and therefore, the plaintiffs cannot claim any share in the suit property during the life time of the defendants 2 and 3. He further contended that the plaintiffs have no cause of action to file the above suit. He would further contend that even after framing of issues, the plaint can be rejected under Order VII Rule 11 of CPC and hence, he prayed to allow the appeal and reject the plaint.

15. In support of the aforesaid contentions, the learned Senior Counsel relied upon the following decisions:

1. T. Arivanandam Vs. T.V.Satyapal and Another reported in (1977) 4 SCC 467

2. I.T.C Limited Vs. Debts Recovery Appellate Tribunal and others reported in (1998) 2 SCC 70

3. A.E.Rathina Naicker Vs. V. Thirumalai and Others reported in (2017) 4 MLJ 40.

16. Learned counsel for the respondents 1 to 4/plaintiffs 1 to 4, on the contrary, contended that already the appellants herein/defendants 1, 4 and 5 have filed written statement and additional written statement and issues also have been framed

and that the suit has been posted for trial. He further contended that the sale deed dated 03.08.1950 would clearly show that the mother of the defendants 2 and 3 viz., Lakshmi Ammal was the absolute owner of the suit property and by suppressing the said fact, the first defendant has played fraud and misrepresented the defendants 2 and 3 that the suit property was belonging to the Hindu undivided family and obtained signatures from the defendants 2 and 3 in the partition deed dated 27.12.1973 and therefore, there are triable issues in the suit. He further contended that after taking into consideration all the aforesaid facts, the learned Single Judge has rightly dismissed the application which was filed under Order VII Rule 11 of C.P.C., and hence he prayed to dismiss the appeal.

17. The question as to whether the power to reject the plaint under Order VII Rule 11 CPC can be exercised, even after framing of issues has already been answered in I.T.C Limited Vs. Debts Recovery Appellate Tribunal and others (supra), wherein the Hon'ble Supreme Court in paragraph No.13, has observed as follows:

"We may state that in the context of Order 7 Rule 11 CPC., a contention that once issues have been framed, the matter has necessarily to go to trial has been clearly rejected by this Court in *Azhar Hussain vs. Rajiv Gandhi* (SCC p.324) as follows: (SCC para 12)

"In substance, the argument is that the Court must proceed with the trial, record the evidence, and only after the trial....is concluded that the powers under the Code of Civil Procedure for dealing with a defective petition which does not disclose cause of action should be exercised. With respect to the learned counsel, it is an argument which it is difficult to comprehend. The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the Court"

The above said judgment which related to an election petition is clearly applicable to suits also and was followed in *Samar Singh vs. Kedar Nath*. We therefore hold that the fact that issues have been framed in the suit cannot come in the way of consideration of this application filed by the appellant under Order 7 Rule 11 C.P.C."

Therefore it is clear that merely because issues have been framed, it cannot be said that the application under Order VII

Rule 11 CPC is not maintainable.

18. In T. Arivanandam Vs.T.V.Satyapal and Another reported in (1977) 4 SCC 467, the Hon'ble Supreme Court has observed in paragraph No.5 as follows:

"5. The learned Munsif must remember that if on a meaningful - not formal - reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order VII, Rule, C.P.C, taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X, C.P.C., An activist Judge is the answer to irresponsible law suits."

19. In A.E.Rathina Naicker Vs. V. Thirumalai and Others (supra) one of us (M.Sathyarayanan.,J.) in paragraph No.11 has observed as follows:-

"11. Law is well settled that dexterity of the draftsmen whereby the material facts are camouflaged in a cleverly drafted plaint and illusionary cause of action is set out, cannot defeat the right of the defendant to get the plaint rejected. "

20. In Saleem Bhai and Others Vs. State of Maharashtra and Others, (2003) 1 SCC 557, the Hon'ble Supreme Court has held that for the purpose of deciding an application under Order VII Rule 11 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be irrelevant at that stage. The relevant portion of the Judgment is extracted hereunder.

"9. A perusal of Order VII Rule 11 C.P.C. makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order VII Rule 11 C.P.C. at any stage of the suit-before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order VII C.P.C. the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage."

21. In Popat and Kotecha property Vs. State Bank of India Staff Association, (2005) 7 SCC 510, the Hon'ble Supreme Court has observed that Order VII Rule 11 CPC lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The relevant portion of the Judgment is extracted hereunder.

"23.Rule 11 of Order VII lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word 'shall' is used clearly implying thereby that it casts a duty on the Court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. In any event, rejection of the plaint under Rule 11 does not preclude the plaintiffs from presenting a fresh plaint in terms of Rule 13. "

22. Keeping in view the aforesaid legal principles, the relief sought for in the suit as quoted supra have to be considered. It would be relevant to extract some of the averments made in the plaint which are as follows:

22.1 In paragraph No.10. "the plaintiffs state that after the death of Mr.Rm.Avadiappa Chettiar, on 15.05.1970, the 1st defendant fraudulently usurped the properties of the 2nd and 3rd defendants along with their title deeds and other documents"

22.2 In paragraph No.11."The plaintiffs understand that suppressing the rights of the 2nd and 3rd defendants, the 1st defendant kept them out of enjoyment of the said property. Though the said property belonged to Lakshmi Ammal and later to Rm.Avadiappa Chettiar and the 2nd and 3rd defendants, the 1st defendant fabricated Documents as though the said property was the joint family property of Rm.Avadiappa Chettiar and the 1st defendant."

22.3 In paragraph No.12. " The plaintiffs understand that the 1st defendant misrepresented and misled the 2nd and 3rd defendants that they had no legal right in the said property and fraudulently usurped their share in the property and made them sign documents giving up their rights over the same."

22.4 In paragraph No.13. "The plaintiffs understand that the 1st defendant by such fraudulent misrepresentation induced the 2nd and 3rd defendants into signing a Partition Deed dated 27.12.1973 (Doc.No.2303/1973, SRO Mylapore). By the said Partition Deed, the 1st defendant induced the 2nd and 3rd defendants to release and relinquish their shares in 'the said property' in his favour, by showing a meager payment".

22.5 In paragraph No.14." The plaintiff's submit that the Partition Deed dated 27.12.1973 (Doc.No.2303/1970 SRO Mylapore) is illegal, null and void and not binding on the 2nd and 3rd Defendants, Even if it is assumed that the 2nd and 3rd defendants are bound by their act in releasing their share in 'the said property' in favour of the 1st defendant, the same in any event is not binding on the plaintiffs, as the 2nd and 3rd defendants had no right to surrender the plaintiff's rights in 'the said property', which they inherited from their mother Mrs.Lakshmi Ammal. The said property being ancestral property, the alleged release of their share by the 2nd and 3rd defendants is not binding on the plaintiffs."

23. The aforesaid averments would clearly show that virtually the plaintiffs are conducting the case on behalf of the defendants 2 and 3. If any fraud or misrepresentation is played by the first defendant against the defendants 2 and 3 and obtained signatures in the partition deed dated 27.12.1973, it is for the defendants 2 and 3 to question the same. Admittedly, the defendants 2 and 3 have not challenged the said partition deed and that being so, it is not open to the plaintiffs who are being the sons and daughters of defendants 2 and 3 to plead that the said document is not binding on the defendants 2 and 3.

24. It is pertinent to note that in the plaint, nowhere it is stated that why the plaintiffs have arrayed their mothers viz., Mrs.Sethulakshmi Baskaran and Mrs. Aru.Meena, as defendants 2 and 3. It is not the case of the plaintiffs that they were defrauded by the defendants 2 and 3 and it is also not their case that they are not having cordial relationship with their mothers. That being so, instead of adding their mothers as plaintiffs, why they have arrayed them as defendants is not explained. It shows that the suit itself is a collusive one and the same has been filed on behalf of the defendants 2 and 3.

25. As per the plaint averments, the suit property is the absolute property of the said Lakshmi Ammal, who is mother of the defendants 2 and 3 and if that being so, after the death of the said Lakshmi Ammal, as per Section 15 of the Hindu Succession Act, the property shall devolve on her daughters

(defendants 2 and 3) and husband (Rm.Avadiappa Chettiar) who are her legal heirs. Admittedly, the said Rm.Avadiappa Chettiar died on 15.05.1970 and thereafter, the defendants 1 to 5 have divided the suit property through a partition deed dated 27.12.1973. Through the said partition deed, the defendants 2 and 3 have relinquished and released their shares in favour of the first defendant by receiving Rs.80,000/- each. The defendants 2 and 3, till date, have not challenged the said partition deed. When the defendants 2 and 3 themselves have not challenged the said partition deed, it is not open to the plaintiffs who are being the sons and daughters of the defendants 2 and 3 to question the said partition deed.

26. The contention of the plaintiffs that the suit property is the ancestral property to them cannot be accepted. In Natarajan Vs. Paramasivam, 2010 (2) CTC 198, this court held that any property derived or inherited from the female line or through the maternal grandparents is a separate property and cannot be termed as the joint family property. Therefore, the property of the female Hindu, will always be treated as her absolute property. It cannot be said that the said property is the ancestral property of the plaintiffs. Therefore, the plaintiffs have no cause of action for filing the above suit. Accordingly, it has to be held that the plaint does not disclose cause of action.

27. The next point is whether the suit is barred by any law. According to the defendants 1,4 and 5, the suit is barred by limitation. The question of limitation is the mixed question of law and facts. In this context, it would be relevant to refer the decision in Dega Jayalakshmi and 3 others Vs.Kapoor Enterprises, rep. By its Managing Partner, R.M.Lakshman Dass and Others (2010) 1 MLJ 1167 wherein, this court in paragraph No.15, has held as follows:-

"15. As rightly contended by Mr.P.R. Raman, learned counsel for the plaintiff, the Supreme Court in its Judgment of Kamala v. K.T.Eshwara Sa (supra), has held that the suit cannot be dismissed without proper pleadings, framing of issues on limitation and taking evidence. The question of limitation is the mixed question of law and facts. Therefore, a mere reading of plaint, it cannot be held that the suit is barred by limitation. At this stage, the Court cannot look into the pleadings of the defendants."

28. As already pointed out that the plaint averments alone germane and the averments made in the written statement are totally irrelevant for deciding the application which has been filed under Order 7 Rule 11 C.P.C. As per Order VII Rule 11 (d) C.P.C., the plaint can be rejected only where the suit appears

from the statement in the plaint to be barred by law. In this case, the plaintiffs have stated that only in the month of May/June, 2013, they got knowledge about the execution of partition deed dated 27.12.1973 between the defendants and hence, the question of limitation cannot be decided at this stage. Accordingly, this point is answered.

29. Point No.3:

In view of the findings of this court that the plaintiffs have no cause of action for filing suit, it has to be held that the plaint does not disclose a cause of action. Therefore, the plaint has to be rejected on the ground that the plaint does not disclose the cause of action and consequently, this appeal has to be allowed. Accordingly, this point is answered.

30. In the result, this appeal is allowed. Order passed in A.No.2020/2017 dated 20.09.2017 is set aside. A.No.2020/2017 is allowed. Consequently, the plaint in C.S.No.535/2014 is rejected under Order VII Rule 11 (a) C.P.C. Considering the relationship between the parties, no order is passed with regard to costs. Consequently, connected miscellaneous petition is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

gv

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O.S.A.No.303 of 2017
and
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