

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.06.2019

PRONOUNCED ON: 26.07.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.28 of 2016
and
C.M.P.No.871 of 2016

Amsaveni

Appellant

Vs.

Viswanathan

Respondent

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated of the Principal District Judge of Krishnagiri, dated 11.09.2009 in A.S.No.18 of 2008 reversing the judgment and decree of the Principal Subordinate Judge of Krishnagiri, dated 11.08.2008 in O.S.No.32 of 2000.

For Appellant : Mr.J.Hariharan
for M/s.V.Nicholas

For Respondent : Mr.D.Shivakumaran

J U D G M E N T

In this Second Appeal, challenge is made to the judgment and decree dated 11.09.2009 passed in A.S.No.18 of 2008 on the file of the Principal District Court, Krishnagiri, partly modifying the judgment and decree dated 11.08.2008 passed in O.S.No.32 of 2000 on the file of the Principal Subordinate Court, Krishnagiri.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

3. Suit for partition, possession and mense profits.

4. The case of the plaintiff in brief is that the plaintiff is the daughter and the second defendant is the son of the first defendant and the plaintiff was married to one Rajaram in the year 1987 and they had two children and the plaintiff's husband began to ill-treat the plaintiff and therefore the plaintiff had left the company of her husband six years ago and came to her parents house along with the male child and subsequently the male child had been taken away by the plaintiff's husband and the plaintiff was provided separate residence by the defendants and accordingly the plaintiff was also enjoying the suit

properties as the joint family member of the defendants and the suit properties are the joint family properties of the plaintiff and the defendants and accordingly, the plaintiff is entitled to obtain her share in the suit properties and further according to the plaintiff, during the pendency of the suit, the first defendant had died and the plaintiff and the second defendant alone are his legal heirs and the wife of the first defendant had already predeceased him and hence according to the plaintiff, she is entitled to obtain half share in the suit properties and hence the suit.

5. The defendants resisted the plaintiff's suit contending that the plaintiff was married to one Rajaram in the year 1987 and they were living separately in Krishnagiri. Out of their wedlock, they got two children. Though it had been admitted by them that the plaintiff is residing in the suit properties, however contended that the plaintiff was not enjoying the suit properties along with the defendants as a member of the joint family and further according to the defendants, the suit properties are not the joint family properties of the plaintiff and the defendants and according to the defendants, at the time of marriage of the plaintiff with Rajaram, she had been given 60 cents of land with 10 coconut trees, a mangalore tiled house, 15 sovereign

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jewels and sum of Rs.25,000/- towards her share and now with ulterior motive, the plaintiff and her husband are making false claim over the suit properties and had come forward with the suit and therefore the suit laid by the plaintiff is liable to be dismissed.

6. In the additional written statement, the second defendant putforth the case that except item 2, all other suit properties are the joint family properties of the second defendant and the first defendant and the plaintiff is not a member of the joint family and the plaintiff having married in the year 1987, she ceases to be a member of the joint family as well as not entitled to claim any share in the suit properties and further according to the second defendant, there was a partition between him and the first defendant by way of a registered partition deed dated 05.06.1995 and as per the same, the suit item 6 land S.No.124/3 dry 0.61 acres 0.24.5 hectares and the suit item 7 land S.No.177/1 dry 1.49 acres or 0.60.0 hectares were allotted to the share of the first defendant and the second defendant was allotted the suit item 3 land S.No.123/2 wet 1.18 acres or 0.46.5 hectares suit item 4 land S.No.124.2B wet 0.70 acres or 0.28.0 hectares and suit item 8 land S.No.178/3A dry 1.98 acres or 0.80.0 hectares and the suit item 5 land S.No.124/1A dry 0.28.0 hectares and also the terraced

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house mentioned in suit item II and the tiled house mentioned in suit item III were also allotted to the share of the second defendant and the second defendant has been enjoying the same and the first defendant had executed the registered settlement deed dated 22.10.1999 gifting the properties allotted to him in favour of the second defendant and the second defendant had accepted the same and taken delivery of the said properties and therefore the second defendant is now absolutely entitled to the suit items 3,4,5,6,7 and 8 and the house buildings mentioned in suit items II and III and enjoying the same and the same are not available for partition and at the time of the abovesaid partition, the suit item land S.No.122/1 B wet o.23.0 hectares were set apart to be given to the plaintiff and hence the said land may be allotted to the share of the plaintiff. Further it is stated that the land mentioned in suit item (2) namely 123/1 wet 0.18 acres or 0.07.5 hectares belong to Manickammal, the mother and she had purchased the same by way of a registered sale deed dated 27.04.1975 and enjoying the same and Mancikammal had gifted the same in favour of the defendant by way of a registered settlement deed 14.12.1995 and the defendant became entitled to the abovesaid property and the plaintiff is not entitled to claim any partition with reference to the same and hence according to the second defendant,

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the plaintiff is not entitled to the reliefs prayed for and suit laid by her is liable to be dismissed.

7. In support of the plaintiff's case, P.W.1 was examined. Exs.A1 to A3 were marked. On the side of the second defendant, D.W.1 was examined. Exs.B1 to B4 were marked.

8. On a consideration of the oral documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to declare that the suit properties are the joint family properties and that the plaintiff is entitled to half share in all the items except item No.I in Serial No.2 mentioned as S.No.123/1, an extent of 0.07.5 hectares or 0.18 acres and accordingly decreed the suit in favour of the plaintiff. Impugning the same, the second defendant preferred the first appeal.

9. The first appellate court on a consideration of the materials placed on record and the submissions made, was pleased to modify the judgment and decree of the trial court and granted the preliminary decree in favour of the plaintiff only in respect of item No.1 and ¼ share in Item Nos.5, II and III of the suit properties and accordingly

disposed of the appeal. Impugning the same, the plaintiff has come forward with the present second appeal.

10.At the time of admission of the second appeal the following substantial question of law was formulated for consideration.

Whether the lower appellate court was right in holding that the plaintiff is entitled for only 1/4th share in suit item 5 in the schedule No.1 and the properties in the schedule Nos.2 and 3, when the plaintiff had become a Coparcenary along with the defendant by virtue of the Hindu Succession Amendment Act,2005.

11. The relationship between the parties is not in dispute. It is found that the plaintiff is the daughter and the second defendant is the son of the first defendant. Now according to the plaintiff, the suit properties are the joint family properties consisting of the plaintiff and the defendants and accordingly she is entitled to claim share in the suit properties as prayed for. Pending suit, the first defendant having died, it is seen that the plaintiff has claimed half share in the suit properties.

12. According to the second defendant, the plaintiff is not entitled to claim share in the suit properties, inasmuch as, she had got married in the year 1987 itself and living separately much prior to the coming into force of the Hindu Succession [Amendment] Act 1989 and the Hindu Succession [Amendment] Act 2005 and thereby contended that the plaintiff cannot claim herself to be a coparcener *qua* the suit properties.

13. As could be seen from the plaint averments, the plaintiff has clearly admitted that she was married to one Rajaram in the year 1987. Therefore, it is found that as determined by the first appellate court, the plaintiff having got married prior to the enactment of the Hindu Succession [Amendment] Act 1989 and the Hindu Succession Amendment Act 2005 as provided in the abovesaid Act, the plaintiff would not be entitled to claim share in the suit properties claiming to be a coparcener of the same.

14. Furthermore, according to the second defendant, the suit properties had come to be partitioned between him and the first defendant by way of a registered partition deed dated 05.06.1995 marked as Ex.B1 and therefore it is found that, as determined by the

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first appellate court, the abovesaid partition would not be affected by the Hindu Succession [Amendment] Act 2005, which came into effect only on 09.09.2005. Thus, it is found that the suit properties had come to be partitioned between the defendants 1 and 2 by way of Ex.B1 partition deed and it is further seen that the first defendant had settled his share in favour of the second defendant by way of the settlement deed dated 22.10.1999 marked as Ex.B2. In such view of the matter, it has to be seen whether in the light of Exs.B1 and B2, the plaintiff would be still entitled to claim share in the suit property as putforth by her. As could be seen from the pleas putforth by the respective parties in the matter, no doubt, the second defendant has not come forward with the case *qua* the abovesaid partition deed and settlement deed while filing the written statement at the first instance. The same had come to be divulged by him only in the additional written statement. Furthermore, it is also seen that the second defendant has taken the plea that the suit item (2) namely S.No.123/1 wet 0.18 acres belonged to Manickammal by way of a sale deed dated 27.04.1975 and the abovesaid sale deed has been marked as Ex.B3 and it is further pleaded by the second defendant that Manickammal had settled the abovesaid property in his favour by a deed of settlement dated 14.12.1995 marked as Ex.B4 and on that footing,

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contended that it is only the second defendant who is the absolute owner of the suit properties comprised in Ex.B1 partition deed and the settlement deeds marked as Ex.B2 and Ex.B4.

15. In the Second Appeal, the plaintiff's counsel contended that the abovesaid partition deed and settlement deeds projected by the second defendant are not true documents and if they had been really executed, according to him, they would have been disclosed in the original written statement, on the other hand, the same had come to be divulged only in the additional written statement and further according to him, the second defendant having failed to produce the original partition deed and the original settlement deeds, but, had only produced the registration copies of the said instruments/documents, on that basis, the truth and validity of the abovesaid instruments cannot be accepted and therefore according to him, the Courts below had erred in upholding the truth and validity of the abovesaid instruments based on the registration copies of the said documents. No doubt, the second defendant has not whispered about the above partition and settlement deeds in the original written statement and had divulged the same only in the additional written statement. It is further seen that during the course of trial, the abovesaid documents

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had come to be marked on the side of the second defendant as Exs.B1 to B4 and it is further seen that the plaintiff has not objected to the marking of the registration copies of the abovesaid documents and also after the additional written statement had been filed by the second defendant, the plaintiff has also not repudiated the allegations contained in the additional written statement *qua* the abovesaid partition deed and the settlement deeds pleaded/placed by the second defendant by way of a reply statement. Furthermore, the plaintiff has also not spoken about the settlement deeds relied upon by the second defendant during the course of her chief examination and in such view of the matter, as rightly putforth by the defendants' counsel when the admissibility of Exs.B1 to B4 is not in issue and in the context, as the plaintiff has failed to object to the marking of the abovesaid documents in any manner, in such view of the matter, according to him, when Exs.B1 to B4 are not challenged as totally inadmissible documents on the part of the plaintiff and the plaintiff had only objected to the same subsequently contending that the mode of proof with reference to the same is inadequate, as putforth by the defendants' counsel, such objections should have been taken by the plaintiff when Exs.B1 to B4 had been tendered in evidence and once the abovesaid documents had been admitted in evidence and marked as exhibits, the objection that

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it should not have been admitted in evidence or that the mode adopted for proving the said documents is irregular cannot be allowed to be raised at any stage subsequent to the marking of the documents as exhibits and the abovesaid position of law could be gathered from the decision relied upon by the defendants' counsel reported in **2004 (7) SCC 107 [Dayamathi Bai Vs. K.M.Shaffi]** and the same had been outlined in the abovesaid decisions are as follows:

A. Evidence Act, 1872 -S.65 – Secondary evidence – Admissibility of certified copies of documents – Objection when to be raised – Held, where a party gives certified copy in evidence, without proving the circumstances entitling him to give secondary evidence, objection must be taken at the time of admission and not at a later stage.

B. Civil Procedure Code, 1908 – Or.13 Rr.1,3 and 7 – production of documentary evidence – Certified copy of a sale deed – objection to mode of proof as being irregular and insufficient – Held, should be taken at trial before the document is marked as an exhibit and admitted to the record and not later at appellate stage.

C. Evidence Act, 1872 – Ss.65, 90 and 104 – Appellant not objecting to the certified copy of registered sale deed being marked Ex.P1 and admitted in evidence – But later on objecting and submitting that only after the document becomes incapable of being proved for want of primary evidence, the foundation of secondary evidence must be laid

- That since in the instant case no steps were taken to produce the original deed nor to prove its loss nor to establish the source from which the certified copies were obtained, foundation for admissibility of secondary evidence was not laid and hence High Court erred in holding that the registered certified copy of the sale deed was admissible in evidence as the document was more than 30 years old - Held, in the instant case, the objection was not as to admissibility of the certified copy but that the mode of proof was irregular and insufficient - Objection as to mode of proof falls within procedural law and can be waived - Further held, such objections must be taken before the document is marked as an exhibit and admitted to the record - Objection therefore not sustainable - Practice and Procedure - Procedural law - Mode of proof - Civil Procedure Code, 1908 - Or.13, Rr.1,3 and 7.

13. We do not find merit in this civil appeal. In the present case the objection was not that the certified copy of Ex.P.1 is in itself inadmissible but that the mode of proof was irregular and insufficient. Objection as to the mode of proof falls within procedural law. Therefore, such objections could be waived. They have to be taken before the document is marked as an exhibit and admitted to the record (see Order 13 Rule 3 of the Code of Civil Procedure). This aspect has been brought out succinctly in the judgment of this Court in *R.V.E. Venkatachala Gounder Vs. Arulmugu Viswesaraswami & V.P.Temple* to which one of us, Bhan, J., was a party vide para 20: (SCC p.764)

"The learned counsel for the defendant-respondent has relied on Raman Catholic Mission Vs. State of Madras in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (1) an objection that the document which is sought to be proved is itself **inadmissible** in evidence and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the **mode of proof** alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an

exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there: and secondly, in the vent of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be proved be no bar to raising the objection in a superior court."

14. *To the same effect is the judgment of the Privy Council in the case of **Gopal Das Vs. Thakurji** in which it has been held that when the objection to the mode of proof is not taken, the party cannot lie by until the case comes before a court of appeal and then complain for the first time of the mode of proof. That when the objection to be taken is not that the document is in itself inadmissible but that the mode of proof was irregular, it is essential that the objection should be taken at the trial before the documents is marked as an exhibit and admitted to the record. Similarly, in Sarkar on Evidence, 15th Edn., p.1084, it has been stated that where copies of the documents are admitted without objection in the trial court, no objection to their admissibility can be taken afterwards in the court of appeal. When a party given in evidence a certified copy, without proving the circumstances entitling him to give secondary evidence, objection must be taken at the time of admission and such objection will not be allowed at a later stage.*

In the light of the above position of law as outlined in the abovesaid decision of the Apex Court, considering the factum that the plaintiff having failed to object to the admissibility of the abovesaid documents, it is seen that the plaintiff cannot at a later point of time challenge the same on the footing that they are only secondary evidence and that the second defendant had failed to place the original documents for

consideration. Therefore the contention raised by the plaintiff's counsel with reference to Exs.B1 to B4 had been rightly turned down by the first appellate court and considering the position of law with reference to the same, as above pointed out, I do not find any acceptable reason to interfere with the abovesaid determination of the first appellate court.

16. It is seen that the plaintiff prior to the institution of the suit had issued a pre-suit notice claiming partition. No doubt the same had not been repudiated by the defendants. But considering the facts and circumstances of the case in *toto*, it is seen that as determined by the first appellate court, the non-issuance of the reply to the pre-suit notice issued by the plaintiff, would not amount to- cannot be held to be the admission on the part of the defendants i.e., that the plaintiff is entitled to claim share in the suit properties as put forth by her.

17. Considering the import of the partition deed Ex.B1 and the settlement deeds marked as Exs.B2 and B4 in *toto*, it is found that the second defendant is the absolute owner of the item Nos.3,4,6,7 and 8 of the plaint schedule properties on the strength of the documents marked as Exs.B1 and B2 and the absolute owner of the item (2) of

the plaint schedule properties on the strength of Ex.B4 deed. Furthermore, as determined by the first appellate court, the second defendant had failed to establish that the schedule II and III of the plaint schedule properties had been allotted in his favour and therefore it is seen that with reference to the abovesaid items and as the first defendant had admitted that item 1 had been allotted in favour of the plaintiff, accordingly it is seen that the first appellate court had held that the plaintiff being not the coparcener, at the most, would be entitled to claim only the share due to her as the legal heir of her father and accordingly the first appellate court had determined that the plaintiff is entitled to obtain only item 1 and $\frac{1}{4}$ share in item No.5, II and III of the plaint schedule properties and accordingly disposed of the second appeal.

18. Considering the reasonings and conclusions of the first appellate court for arriving at the abovesaid determination, they being sound and in accordance with law, accordingly no interference is warranted with reference to the same in any manner and in such view of the matter, I do not find the involvement of any substantial question in the second appeal. Be that as it may, the substantial question of law formulated in the second appeal is accordingly answered against the plaintiff and in favour of the second defendant.

19.In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

26.07.2019

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Index:yes
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1. The Principal District Judge,
Principal District Court,
Krishnagiri,
- 2.The Principal Subordinate Judge,
Principal Subordinate Court,
Krishnagiri,

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