

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 22.08.2019

Judgment Pronounced on:05.06.2020

CORAM : THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.1622 of 2004

1. Marimuthu
2. Perumal
3. Rajeswari ... Appellants/Defendants 18 to 20

Vs

1. Natarajan
2. Kalaiselvi (Deceased)
3.Thangammal (Deceased) ... Respondents 1 to 3/Defendants 2, 15, 16
4. Ganga ... 4th Respondent /21st defendant
5. Ramalingam
6. S.Anandhi @ Dhayananthi
7. Devi @ Sridevi
8. Vinodhini ... Respondents 5 to 8

(Respondents 5 to 8 brought on record as legal representatives of the deceased 2nd respondent, and 1st respondent is recorded as legal representative of the deceased 3rd respondent vide Order of Court dated 12.11.2013 made in C.M.P.Nos.1233 to 1235 of 2011 in S.A.No.1622 of 2004.)

Prayer :- Second Appeal filed under Section 100 of CPC, against the judgment and decree dated 22.04.2004 in A.S.No.13 of 2001 on the file of the Subordinate Judge, Tirupattur at Vellore, in confirming the Judgment and Decree dated 30.03.2001 in O.S.No.871 of 1980 on the file of the District Munsif, Tirupattur.

For Appellants : Mrs.V.Srimathi
for Mr.V.Raghavachari

For Respondents : Mr.P.Chandrasekar [R5 to R8]
No Appearance [R1, R4]

JUDGMENT

1.1 The defendants 18 to 20, in a suit for declaration of title, recovery of possession and mesne profits, have come forward with this appeal.

1.2 The suit was initially decreed, challenging which the defendants had preferred A.S.No.27 of 1984. The first Appellate Court remanded the matter back to the trial Court, after which, the trial Court decreed the suit yet again. Challenging this decree the defendants 18 to 20 have preferred A.S.No.13 of 2001, and that came to be dismissed. Hence, this second appeal.

2.1 The suit properties are 15 in number, and it is admitted on either side that it originally belonged to one Unnamalai Ammal. Her son is Veerappa Chetty. He is the first defendant in the suit. He was married to Rathinammal, she is the plaintiff. The couple had a son Arunachalam @ Kannu. Besides, they had a daughter named Kalaiselvi, who is the 15th defendant.

2.2 Be that as it may, on 30.12.1964 Vide Ext.A.1, settlement deed, Unnamalai Ammal had settled the suit property in favour of her grandson Arunachalam alias Kannu. On 18.05.1976, Arunachalam died, leaving behind his mother Rathinammal (the plaintiff) to succeed to his estate. On the strength of her title as stated above, the plaintiff had laid the suit for declaration of her title. The prayer for possession of the suit property comes in the context of various tenants in the suit property, who originally were arrayed as defendants 2 to 14.

3. During the pendency of the suit, the first defendant Veerappa Chetty died. Hence, Kalaiselvi, born to the plaintiff and the first defendant as referred to above, was brought in as the legal representative. Besides, defendants 16 to 21 also came to be impleaded as the heirs of the first defendant. Of them, defendants 16 and 17 are stated to be the sisters of Veerappa Chetty. The other part of the dispute concerns defendants 18 to 20. They were alleged to be the illegitimate children born to Veerappa Chetty through the 21st defendant.

4.1 The suit was contested chiefly by the first defendant Veerappa Chetty. The primary defense that he had taken in his written statement was that Ext.A.1, settlement deed which his mother Unnamalai Ammal had executed in favour of his son Arunachalam was a sham and nominal document, and that it was never acted upon. Arunachalam died when he was barely a year and a half old. And, this defendant had not accepted any such settlement on behalf of the deceased Arunachalam.

4.2 Defendants 2 to 4, 6 to 13 in their written statement claim that they were the tenants of the suit properties under Unnamalai Ammal and that they were willing to pay the rent to whoever, who the Court directs.

4.3 The 21st defendant had filed a written statement, wherein she allege that on 11-02-1973, Veerappa Chetty had married her, that through him she had begotten defendants 18 to 20, and that on 23-01-1986 Veerappa Chetty had executed a Will in their favour, and died on 17-06-1986. She claimed that the suit properties never belonged to Unnamalai Ammal, and added that on 10-05-1982, the first defendant along with her sister, sold items 6 to 11 in the plaint scheduled properties to the 7th defendant (who was previously the tenant), and that the 15th item of suit property was sold by him to a certain Ramaswamy on 05-05-1982. In addition, she pleaded that items 13 and 14 were purchased by first defendant's father Arunalachalam Chetty in a Court-auction sale in O.S.1/1923.

5.1 When the matter went for trial, both sides adduced oral and documentary evidence. Of the four documents that the plaintiff had produced, she relied on Ext.A.1, the settlement deed executed by Unnamalai Ammal followed by Ext.A.3 and Ext.A.4, the sale deeds that the first defendant had executed on the basis of Ext.A.1. The defendants have examined as many as 11 witnesses, of who Veerappa Chetty himself was D.W.1. The 21st defendant examined herself as D.W.5.

5.2 During trial, an attempt was made to prove that Unnamalai Ammal had cancelled Ext.A-1 settlement deed for which purpose the defendants examined D.W.3, an Advocate, through whom Ext.B-6 notice dated 30-07-1976, cancelling the settlement deed was issued.

5.3 The trial Court found that inasmuch as the first defendant Veerappa Chetty had not disputed the title of Unnamalai Ammal, the defendants 18 to 21 who claim under the former, cannot put forward a plea that Veerappa Chetty himself had not taken. It then proceeded to hold that Ext.A-1 was validly executed and also added that Veerappa Chetty, during his oral testimony was caught in uncertainty as to the due execution of the document. It rejected the alleged cancellation of Ext.A-1 settlement deed through Ext.B-6 notice on two grounds: (a) D.W.3 was not sure if the person who instructed him was Unnamalai Ammal; and (b) A validly executed settlement deed cannot be unilaterally revoked. So far as the two sale deeds (both of which are not seen to be produced) that Veerappa Chetty was stated to have executed either alone or along with his sister, the trial Court found that they were affected by lis pendens doctrine.

6. When the matter reached the first appellate Court at the instance of the defendants 18 to 21, the thrust was on Ext.B-15, a certified copy of the Will dated 10-11-1953, by a certain Arunachalam Chetty, who was the father of Veerappa Chetty, the first defendant, under which he was stated to have

bequeathed the suit properties to his wife Unnamalai Ammal for life, and thereafter to his son Veerappa Chetty. Dealing with the same, the first appellate Court held that the first defendant had not pleaded this Will in his written statement, and at any rate, this Will was not proved. Secondly, following the reasoning of the trial court, it held that the first defendant had attempted to prove that the suit properties are ancestral properties without pleading them. As could be anticipated now, the appeal also came to be dismissed.

7. Challenging the same, defendants 18 to 20 have approached this Court. This appeal was admitted for considering the following substantial questions of law:

1. Whether the present suit is not hit under the principles of res judicata in view of the finding in O.S.No.1 of 1996 on the file of the District Judge, Vellore?
 2. Whether the suit is not barred under Order 23 CPC, when a compromise had been entered into in O.S.No.38 of 1938 on the file of Sub Court, Vellore, in the presence of Arunachalam, the (assumed) predecessor in title of the plaintiff?
 3. Whether Unnamalai Ammal could assert any right to the property in the light of the documentary proof under Exs.B.4, B.5, B.15 and B.51 to 57?
 4. When the plaintiff had failed to establish the settlement dated under Ex.A-1, whether the Courts below are right in recognizing a right in her?
 5. Whether the order of the Courts below are not against Section 13 of the Evidence Act inasmuch as it had failed to take into consideration relevant fact relating to the right of Arunachalam?
8. The learned counsel for the appellants argued:
- While it might be true that the first defendant might not have pleaded that the suit properties are joint family properties, or about the Will of his father (Ext.B-15), in the judgement of the Land Tribunal in O.S.1/1966, marked Ext. B4, it is held that the properties dealt with thereunder are the joint family properties of Arunachalam Chetty and his son Veerappa Chetty. The first appellate Court though referred to the same, has held that inasmuch

as Unnamalai Ammal was not a party to the suit, the same does not bind the appellants. What it failed to note is that this document merit consideration under Sec.13 of the Indian Evidence Act.

- Secondly, there is no evidence that Ext.A-1 settlement deed can create any title in favour of first defendant's son (Arunachalam). First, Unnamalai Ammal did not have any right in the suit properties for her to convey title to the plaintiff. Secondly, there is no proof that the settlement was accepted. Thirdly, Unnamalai Ammal herself had issued Ext.B-6 notice through D.W.3 to revoke the settlement deed.

9. In response, the learned counsel for the heirs of the 15th defendant and the heirs of the plaintiff adopted the line of reasoning of both the trial and the first appellate Courts.

10.1 The arguments of the counsel for the appellants/defendants 18 to 20 might have carried some merit, if, and if only the first defendant had pleaded that which they attempted to prove. Procedure, though a hand maid of justice, needs to be understood as a law on fairness. The statement of law which declares that which is not pleaded cannot be proved, rests solely on the rule of fairness, since no party shall be permitted to bring a surprise on the other side when such other side was least prepared to face it. Procedure, though cannot override the substantial justice which substantial rights would enable enthrone, yet, it does not permit establishing substantial justice by flouting the rules of fairness. The case at hand falls in this category.

10.2. There is a generally recognised exception to the rule of strict pleadings: It is where both the parties, notwithstanding the inadequacy of their pleadings, understood what they are litigating over and have produced requisite evidence. This is available in situations where the evidence adduced touches upon the critical aspects of the cause of action or the defence which have been disclosed substantially, though not fully. But no violation is done to the procedural fairness that governs the judicial process.

11. In the instant case the appellants are caught in an awkward position for more than one reason: First, they, as the legal representatives of the first defendant, have pleaded something which the first defendant himself had not pleaded. This improvement in pleading is impermissible. Second, in attempting to prove it, a certain degree of emphasis laid on Ext.B-4, Order of the Land Tribunal and it was sought to be strengthened by falling back on Sec.13 of the Indian Evidence Act. It has to be clarified that Sec.13 of the Indian Evidence Act only speaks of relevancy of a fact, and does not

deal with res judicata as in Sec.11 CPC. Nor, Ext.B-4 order falls under the category of conclusive judgements as in Sec.41 of the Indian Evidence Act.

12. The next aspect is about the need for this court to interfere with the concurrent findings of the trial Court and the first appellate court. What these courts have held is not just a plausible view but a possible view permitted by rule of pleadings, evidence, procedure besides that which govern the appreciation of evidence. The fact that there could be a better view is no answer for this Court to interfere with the findings on fact by the courts below. It cannot be said that their conclusions would shock the conscience of the all virtuous reasonable man of law. Consequently, this Court desist from interfering with the judgement of the first appellate Court.

13. In conclusion, the appeal is dismissed with costs, and the judgment and decree dated 22.04.2004 in A.S.No.13 of 2001 on the file of the Subordinate Judge, Tirupattur at Vellore, confirming the judgment and decree dated 30.03.2001 in O.S.No.871 of 1980 on the file of the District Munsif, Tirupattur, is hereby confirmed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

tsg/ds

To:

1.The Subordinate Judge,
Tirupattur at Vellore

2.The District Munsif,
Tirupattur.

3.The Section Officer,
VR Section,
High Court, Madras.

S.A.No.1622 of 2004

PA(CO)
CB(18/12/2020)