



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 10.02.2021

CORAM

THE HONOURABLE MR.JUSTICE **R. SUBRAMANIAN**

S.A. (MD)No.31 of 2019

and

C.M.P. (MD)No.1510 of 2019

WEB COPY

Ayyavoo : Appellant/Appellant/First Defendant

Vs.

1.Kesavan
2.Sasireka
3.Muthumari
4.Rathipriya : Respondents/ Respondents 1 to 4/Plaintiffs
5.Mali : 5th Respondent/5th Respondent/2nd Defendant

PRAYER:- Second Appeal filed under Section 100 of Code of Civil Procedure, to set aside the judgment and decree passed in A.S.No.1 of 2011 on the file of the I Additional District Court, Madurai, dated 07.09.2018, which was confirmed in O.S.No.331 of 2007 on the file of the II Additional Subordinate Court, Madurai, dated 15.11.2010.

For Appellant :Mr.C.Vakeeswaran
For R1 to R4 :Mr.S.A.Ajmal Khan

JUDGMENT

The first defendant in O.S.No.331 of 2007, having suffered a decree for partition and separate possession of 1/3 share of the plaintiffs, who happen to be his sister's children, has come up with this second appeal.

2.The suit was laid by the plaintiffs/respondents 1 to 4 herein seeking partition and separate possession of their 1/3 share in the suit property, claiming that the suit property belonged to the parents-in-law of the first plaintiff and maternal grandparents of the plaintiffs 2 to 4. According to the plaintiffs, the suit properties consisting of 6 items belonged to Malaikonar and Karuppayee Ammal. Malaikonar died on 03.02.2007 and Karuppayee Ammal died during the month of Avani "Viya" Tamil year, ie., sometime in 2006-2007. The plaintiffs would further plead that the said Malaikonar and Karuppayee Ammal had three children, namely, Pandiammal and the defendants in the suit. It is also stated that Pandiammal died on 18.08.1994 leaving the plaintiffs as her heirs. The plaintiffs would claim that as heirs of Pandiammal, they are entitled to 1/3 share in the suit property.



3.The suit was resisted by the first defendant contending that the suit items 1 to 3 belonged to him exclusively and items 4 to 6 were bequeathed to him under a settlement deed, dated 21.09.2005 and a Will dated 31.10.2005. Therefore, according to the first defendant, the plaintiffs do not have any share in the suit properties.

4.At trial, the first plaintiff was examined as PW-1, one Rajan was examined as PW-2 and Ex-A1 to Ex-A11 were marked. The first defendant was examined as DW-1 and Ex-B1 to Ex-B12 were marked.

5.The trial Court, upon a consideration of the evidence on record, concluded that the first defendant in his evidence had admitted that the suit items 1 to 3 of the property belonged to his father. The trial Court also faulted the first defendant for not producing any documents except revenue records for establishing his title to the suit items 1 to 3. As regards suit items 4 to 6, the learned trial Judge concluded that the first defendant has not taken steps to prove the settlement deed and Will marked as Ex-B5 and Ex-B10 respectively, by examining the attestators to those documents. On the said conclusions, the trial Court decreed the suit. Aggrieved, the first defendant preferred an appeal in A.S.No.1 of 2011.

6.Pending appeal, the first defendant has filed an application in I.A.No.249 of 2011 seeking permission to examine the attestators. The learned Appellate Judge, by his judgment and decree, dated 04.07.2012, allowed the appeal and remitted the matter to the trial Court on the ground that the trial Court had not adverted into the fact that the first plaintiff, namely, the husband of Pandiammal, will not be a Class-I heir of Malaikonar and Karupayee Ammal and therefore, he would not be entitled to a share in the suit property. The appellate Court overlooked the fact that the question as to whether the first plaintiff would be entitled to a share along with plaintiffs 2 to 4 is purely academic and even conceding that the first plaintiff would not be entitled to succeed to the property of his parents-in-law, the plaintiffs 2 to 4, being grandchildren of Malaikonar / children of predeceased daughter, Pandiammal, would be the class-I heirs of Malaikonar and therefore, they would be entitled to the share of Pandiammal in view of Sections 8 to 10 of the Hindu Succession Act, 1956. On the said pretext, the learned Appellate Judge without deciding the application filed under Order XLI Rule 27 CPC, namely, I.A.No.249 of 2011 allowed the appeal and remitted the matter to the trial Court with liberty to the parties to lead further evidence.

7.This led to the filing of C.M.A.(MD)No.1025 of 2012 by the plaintiffs. This Court, by its judgment, dated 16.02.2018, set aside the order of remand and directed the first appellate Court to dispose of the appeal on merits. Thereafter, the first appellate



Court took up the appeal along with the application under Order XLI Rule 27 of Code and concluded that the first plaintiff has not made out sufficient cause for not examining the attestators even during trial. Taking note of the fact that the first defendant had not even made an attempt to examine the attestators before the trial Court, the learned Appellate Judge concluded that the application is an abuse of process of Court and the same cannot be allowed, as it would amount to allowing the first defendant to fill up the lacuna in the evidence at the appellate stage. On the said conclusion, the learned appellate Judge has dismissed the application in I.A.No.249 of 2011. The learned appellate Judge, considering the other evidence, concurred with the findings of the trial Court on the entitlement of the plaintiffs 2 to 4. The learned appellate Judge decreed the suit granting 1/9 share in the suit items 1 to 3 and 1/3 share in suit items 4 to 6. The plaintiffs 2 to 4 were also permitted to take proceedings under Order XX Rule 12 of Code for determination of the future income towards their share from the properties. Aggrieved, the first defendant has come up with this second appeal.

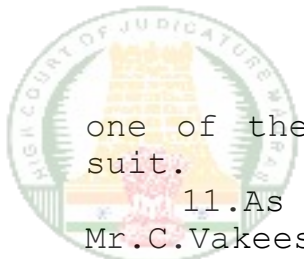
8.The following substantial questions of law were framed at the time of admission:

"(i)Whether the lower appellate Court is right in dismissing the application filed by the defendant for leading additional evidence, more so, in the light of the liberty given by this Court in C.M.A.(MD)No.1025 of 2012?

(ii)Whether the lower appellate Court is right in concluding that the plaintiffs are entitled to share in the Item Nos.1 to 3 in the absence of any evidence relating to the title claim by the plaintiffs?"

9.Heard Mr.C.Vakeeswaran, learned Counsel for the appellant and Mr.S.A.Ajmal Khan, learned Counsel for the respondents 1 to 4. The second defendant/fifth respondent remained absent throughout.

10.Mr.C.Vakeeswaran, learned Counsel for the appellant, elaborating on the questions of law, would vehemently contend that the appellate Court was not right in dismissing the application under Order XLI Rule 27 of Code inasmuch as, this Court had given a liberty to the appellant to adduce additional evidence, while disposing the CMA. He would also contend that the lower appellate Court was not right in rejecting the request for examination of the attesting witnesses, without considering the reasons assigned for their non-examination before the trial Court. He would also submit that the requirements of Order XLI Rule 27 CPC stood satisfied inasmuch as the said evidence is very important in determining a very serious question regarding the validity of the Will and the settlement deed projected by the appellant. He would also submit that the said evidence is necessary and essential for disposal of



one of the core issues, that had arisen for consideration in the suit.

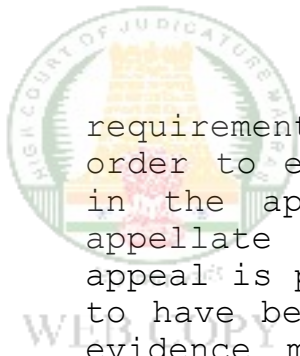
11.As regards the decree regarding suit items 1 to 3, Mr.C.Vakeeswaran, learned Counsel for the appellant would submit that in the absence of any evidence to show that the property belonged to Malaikonar and Karupayee Ammal, the Courts below were not right in coming to the conclusion that the property was the exclusive property of Malaikonar.

12.Contending contra, Mr.S.A.Ajmal Khan, learned Counsel for the respondent 1 to 4/plaintiffs would submit that the lower appellate Court had pointed out several reasons for rejecting the request for letting-in additional evidence in I.A.No.249 of 2011. Pointing out the sequence of events that took place before the trial Court, the learned Counsel would submit that the first defendant, though produced the documents, namely, settlement deed and Will, as Ex-B5 and Ex-B10 respectively, did not even seek to examine the attesting witnesses. He would also submit that the examination of DW-1 was over on 04.10.2010 and the suit was adjourned to 08.10.2010 for further evidence. On the said date, the learned Counsel for the first defendant had made an endorsement closing the evidence on his side. This conduct, according to the learned Counsel for the respondents 1 to 4, would demonstrate that there was no attempt made by the appellant to examine the attesting witnesses before the trial Court. Therefore, according to him, one of the essential requirements under Order XLI Rule 27 of Code, namely, inability to produce such evidence before the trial Court, was not made out.

13.As regards the conclusion of the Courts below on the title to suit item Nos.1 to 3, learned Counsel would point that the appellant, who is a retired Government Servant, in his evidence specifically admitted that suit item Nos.1 to 3 belonged to his father and he was educated from the income from those properties, which according to the learned Counsel for the respondents 1 to 4 cannot be termed as stray admission. The learned Counsel for the respondents 1 to 4 would submit that the appellant was well aware of what he deposed before the trial Court and he was not an illiterate witness to contend that it was a stray admission made without realising the consequences of such admission.

14.I have considered the rival submissions.

15.It is well settled that a person, who relies upon the document, which requires attestation, in order to establish his title, must prove the execution and attestation of the document in the manner known to law under Sections 68 to 71 of the Indian Evidence Act, 1872. Failure to do so, will result the Court in rejecting those documents. Of-course, Order XLI Rule 27 of Code enables the appellate Court to admit additional evidence. But, the said power cannot be exercised for the mere asking. The



requirements of Order XLI Rule 27 of Code must be fully satisfied in order to enable the appellate Court to receive additional evidence in the appeal. The party seeking to produce evidence at the appellate stage must show that the Court, against whose decree the appeal is preferred, has refused to admit such evidence, which ought to have been admitted or the parties seeking to produce additional evidence must establish that the evidence was not within their knowledge, despite the exercise of due diligence and could not produce the same at the time when the decree appealed against was passed or the appellate Court requires any document to be produced or witness to be examined to enable it to pronounce judgment or for any other substantial cause. The term any other substantial cause is controlled by the earlier provisions and has to be read *ejusdem generis*. A reading of Rule 27 Order XLI of Code would itself indicate that unless the person, who seeks letting-in additional evidence satisfies all the above requirements, the appellate Court would be right in rejecting the said request.

16.Though a substantial question of law was framed by me, as if this Court has reserved liberty to the appellant to let-in evidence, while disposing of the C.M.A(MD)No.249 of 2011, on a thorough reading of the judgment of this Court in C.M.A(MD)No.249 of 2011, I find that such liberty was not reserved. It was, therefore, for the appellant to satisfy the requirements of Order XLI Rule 27 of Code in order to enable him to let-in additional evidence or to examine the attesting witness at the appellate stage. The appellate Court has taken note of the sequence of events before the trial Court and concluded that the appellant has not even made an attempt to examine the attesting witnesses before the trial Court. As rightly pointed out by the learned Counsel for the respondents 1 to 4, the appellant was examined as PW-1 on 04.10.2010 and was cross examined on that date. The suit was posted for further evidence on 08.10.2010 and on the said date, an endorsement was made by the learned Counsel for the appellant herein to the effect that his evidence is closed. Therefore, it is clear that there was no attempt made by the appellant to examine the attesting witnesses at that point of time. The appellate Court had considered the provisions of Order XLI Rule 27 of Code and concluded that the appellant has not satisfied the requirements of the said provision to enable him to lead additional evidence. I do not find any reasons to interfere with the said conclusion of the appellate Court.

17.As regards the title claimed by the appellant to suit items 1 to 3, all that the appellant relies upon are only the revenue records, which stand in his name. The appellate Court had adverted to the oral evidence of appellant/DW-1 and pointed out that he has admitted that the properties, namely, suit items 1 to 3 belonged to his father, Malaikonar. In the light of such evidence, which does not appear to be an one of admission, the Courts below cannot be faulted for coming to the conclusion that the appellant has not



established his exclusive title to the property. The admission of the other side is the best evidence. Therefore, the Courts below are perfectly justified in coming to the conclusion that the appellant cannot contend that his parents were not the owners of suit items 1 to 3. The mistake committed by the trial Court in granting a decree to the first plaintiff treating him as heir of his parents-in-law also has been corrected by the appellate Court by modifying the decree and granting a decree in favour of the plaintiffs 2 to 4 alone.

18. In view of the above, both substantial questions of law framed are answered against the appellant and the appeal fails and it is accordingly dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

To

1. The I Additional District Judge, Madurai.
2. The II Additional Subordinate Judge, Madurai.
3. The Section Officer, (2 copies)
VR Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.T.C.S.THILLAINAYAGAN, Advocate (SR-4199[F] dated 10/02/2021)

+1 CC to Mr.S.A.AJMALKHAN, Advocate (SR-4775[F] dated 12/02/2021)

Judgment made in
S.A. (MD) No.31 of 2019
10.02.2021

VB (12.03.2021) 6P 7C