



S.A.No.618 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on 01.02.2024	Judgment Pronounced on 01.03.2024
------------------------------------	--------------------------------------

CORAM

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.618 of 2017
and C.M.P.No.15284 of 2017

1.Mani @ Arumugam
2.Tamilselvan
3.Nallasivam
4.Thangamuthu
5.Marakkal

.. Appellants

Vs.

Chandran

..Respondent

PRAYER: The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 12.06.2017 passed in A.S.No.88 of 2016 on the file of the Principal District Court, Erode, reversing the judgment and the decree dated 15.07.2016 in O.S.No.45 of 2010 before the Sub Court, Gobichettipalayam, by allowing the second appeal.

For Appellants : Mrs.Hema Sampath
Senior Counsel for
Mrs.R.Meenal



S.A.No.618 of 2017

For Respondent : Mr.T.Murugamanickam
Senior Counsel for
Mrs.Zeenath Begam

JUDGMENT

This Second Appeal has been filed against the judgment and decree dated 12.06.2017 in A.S.No.88 of 2016 on the file of the Principal District Court, Erode, reversing the judgment and decree dated 15.07.2016 in O.S.No.45 of 2010 on the file the Sub Court, Gobichettipalayam.

2.The defendants in the suit for partition are the appellants herein.

3.The parties are described as per their litigating status before the Trial Court.

4.The plaintiff filed the suit seeking partition and separate possession of 7/36 share in the suit properties, namely, Item Nos.1 and 2. The case of the plaintiff is that the 1st defendant is the father of the plaintiff and the defendants 2 to 5 and that they were members of a Hindu Joint Family.



S.A.No.618 of 2017

Accordingly to the plaintiff, both the above said Items of the properties were joint family properties and undivided. Though both the Items were purchased in the name of the 1st defendant, father, in the year 1973 (Item – 1) and between 1978 and 1981 (Item – 2), the definite case of the plaintiff was that the properties have been purchased out of the joint earnings of the plaintiff and the defendants and that the plaintiff was also cultivating the properties on lease for past five to six years. Further, the ancestral house in Siruvallur Village, Gobichettipalayam Taluk, Erode, was sold on 11.09.1989 for a sum of Rs.6,000/- and that the sale consideration was utilized for construction of houses in the said two items of the suit properties. According to the plaintiff, the properties were thrown into common stock and the 1st defendant also never claimed or asserted any independent or separate right over the same.

5.It is the further case of the plaintiff that his father had executed four Gift Deeds on 28.08.2008, gifting specific portions in Item No.2 of the suit properties to the defendants 2 to 5, thereby leaving out the plaintiff. According to the plaintiff, the settlement deeds were void as the 1st defendant had no exclusive right or title over the same. However, the plaintiff did not seek for any declaration, but merely chose to seek for relief of partition.



S.A.No.618 of 2017

WEB COPY

6.The 1st defendant, father, filed a written statement denying the claims of the plaintiff. The 1st defendant stated that he was running a mutton shop and his business was flourishing and yielding considerable income and only out of that separate income of the 1st defendant, the properties, namely, Items Nos.1 and 2 were purchased. The 1st defendant has denied any contribution from the other defendants or the plaintiff. As the plaintiff had no right over the suit properties, he could not question the action of the 1st defendant in settling the properties in favour of the defendants 2 to 5, his other children.

7.The 3rd defendant filed a separate written statement reiterating the averments and allegations made by the 1st defendant in his written statement. An additional written statement was filed by the defendants 2, 4 and 5, adopting the written statement filed by 1st defendant, the father. The 6th defendant also adopted the written statement filed by the 1st defendant and the additional written statement filed by the defendants 2, 4 and 5.

8.The Trial Court found that the suit properties were not joint family properties as alleged by the plaintiff, but were only self acquired properties



S.A.No.618 of 2017

of the 1st defendant and therefore, partly decreed the suit granting a 1/6th share to the plaintiff, in the available items of the properties, after execution of Ex.A2 to A5, the settlement deeds.

9.The plaintiff preferred an Appeal against the said judgment and decree of the Trial Court. Before the First Appellate Court, an application was also filed in I.A.No.32 of 2017 under Order 41 Rule 27 of CPC, seeking to mark the evidence of the 3rd defendant in C.C.No.331 of 2009 as P.W.1. The First Appellate Court allowed the said application and received the document and marked the same as Ex.A18.

10.With regard to the nature and characteristics of the properties, the First Appellate Court held that the Sale Deed (Ex.A1) revealed the existence of joint family properties and the sale proceeds from the said property were utilized by the 1st defendant to clear debts. The First Appellate Court therefore presumed that, the property purchased by the 1st defendant, morefully described in Item Nos.1 and 2 of the suit schedule properties were also joint family properties and proceeded to allow the Appeal, thereby granting a decree for partition.



S.A.No.618 of 2017

11.The above Second Appeal was admitted by this Court on 14.09.2017 and the following four substantial questions of law have been framed:

i) Whether in law the lower appellate Court was right in finding that the suit properties were “blended” as joint family properties when there was no ancestral property?

ii) Whether in law the lower appellate Court was right in allowing I.A.No.32 of 2017 for receipt of additional evidence without giving an opportunity to the appellants to disprove it under Section 157 of Indian Evidence Act?

iii) Whether in law the lower appellate Court was right in granting a decree for partition after holding that as per Ex.A18 the parties were already divided.

iv) Whether in law the lower appellate Court was right in overlooking that under Section 145 & 157 of Indian Evidence Act, Ex.A18 could be proved only by cross examining the third appellant and that the respondent not having done at the time of trial was estopped from producing Ex.A18 in the appellate Court?



S.A.No.618 of 2017

WEB COPY

12.I have heard Mrs.Hema Sampath, learned Senior Counsel for Mrs.R.Meenal for the appellants and Mr.T.Murugamanickam, learned Senior Counsel for Mrs.Zeenath Begum for the respondent and perused the entire materials available on record.

13.I will first take up the substantial questions of law 2 and 4 which are inter related. These two substantial questions of law are pertaining to the admission of additional evidence by the First Appellate Court and the effect and applicability of Sections 145 and 157 of the Indian Evidence Act. Admittedly, the 3rd defendant in these proceedings, as complainant, has filed a criminal case against the plaintiff. In the said case, the 3rd defendant has taken a diametrically opposite stand by stating that the suit properties are joint family properties. However, in the present case, he has filed a separate written statement, taking the very same stand that was taken by his father, namely, the 1st defendant by stating that the suit properties are the self acquired properties of the 1st defendant and not joint family properties. In order to take advantage of the contradiction and the evidence available, the plaintiff has sought to mark the evidence adduced by the 3rd defendant before



S.A.No.618 of 2017

the criminal Court. The First Appellate Court has found favour with the said request of the plaintiff and allowed the said application.

14.The relevant Sections 145 and 157 of the Indian Evidence Act are usefully extracted hereunder:

“145. Cross-examination as to previous statements in writing.

A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question without such writing being shown to him, or being proved, but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

157. Former statements of witness may be proved to corroborate later testimony as to same fact.

In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.”



S.A.No.618 of 2017

WEB COPY

Section 145 of the Indian Evidence Act relates to cross-examination of a witness as to any previous statements made by the said witness and relevant to the matter in question, in order to contradict his evidence.

15. In the case of *Laxman and Others Vs. State of Maharashtra*, reported in (1974) 3 SCC 704, the Hon'ble Supreme Court has clearly held that Section 145 of Indian Evidence Act applies only to contradictions and that neither proof nor use of omissions, which do not amount to contradictions is barred by Section 145 of the Evidence Act and on the contrary, Section 157 of the Indian Evidence Act deals with former statements of witness which may be proved in order to corroborate later testimony as to same fact. The Hon'ble Supreme Court, in *Sita Ram Bhau Patil Vs. Ramchandra Nago Patil (Dead) by L.Rs and Another*, reported in (1977) 2 SCC 49, has held that an admission is proved and if thereafter the admission is to be used against the party who had made it, then it would fall within the scope and ambit of Section 145 of the Indian Evidence Act. The Hon'ble Supreme Court also held that even if the admission is proved in accordance with the provisions of the Indian Evidence Act, if it is to be used



S.A.No.618 of 2017

against the party who has made it, then such witness should be given an opportunity, before the documents are used against him, by tendering his explanations to clear up the ambiguity or dispute.

16.In *Bharat Singh and Others Vs. MST.Bhagirathi*, reported in *1965 SCC Online SC 57*, the Hon'ble Supreme Court has held that admissions are substantive evidence by themselves in view of Sections 17 and 21 of the Indian Evidence Act and the purpose of contradicting the witness under Section 145 of the Indian Evidence Act was different from the purpose of proving an admission, admissions being substantive evidence of a fact admitted. However, a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness.

17.This Court, in *Perumal Vs. Senkamalam*, reported in *2013 8 MLJ 517* has held that there is a cardinal distinction between a party who is the author of a prior statement and a witness who is examined and sought to be discredited by use of his prior statement.



S.A.No.618 of 2017

18. Admittedly, in the case on hand, the party whose admission before the criminal Court is sought to be marked is the 3rd defendant in the suit. The contradiction which the plaintiff wanted to illicit was that even though in the written statement, the 3rd defendant has denied the right and entitlement of the plaintiff, by stating that the properties were self acquired properties of the 1st defendant, the father, before the criminal Court where the 3rd defendant was the complainant, he has stated otherwise, clearly indicating that the properties are joint family properties. It is also noticed that before the criminal Court, the 3rd defendant has been cross-examined and he had an opportunity to spell out his case. However, as already discussed, the Hon'ble Supreme Court has clearly held that unless an opportunity is given to the party whose previous evidence of statement is sought to be used against him, to explain the ambiguity and clear the dispute, if any. We have to see whether such a course of action has been undertaken or was there any such possibility in the present case. The 3rd defendant, though filed a written statement, did not choose to lead oral or documentary evidence. The plaintiff, even before the Trial Court, had filed an application in I.A.No.561 of 2015, seeking to recall P.W.1 to mark the deposition of the 3rd defendant in C.C.No.331 of 2009. The said application was dismissed by the Trial



S.A.No.618 of 2017

Court on 02.06.2016 and the said order was not challenged by the plaintiff, by preferring any Appeal or Revision and the said order became final. However, the plaintiff renewed his request before the First Appellate Court with an application under Order 41 Rule 27 of CPC to merely receive the deposition of the 3rd defendant as additional evidence.

19. Before the Trial Court, on the side of the defendants, only the 5th defendant was examined as D.W.1. In view of the ratio laid down by the Hon'ble Supreme Court in *Sita Ram Bhau Patil's case*, if the plaintiff wanted to rely on the evidence of the 3rd defendant in the criminal case, without giving an opportunity to the 3rd defendant, his evidence in the criminal case cannot be received or relied on by the Court. As laid down by the Hon'ble Supreme Court, a mere proof of admission, after the person whose admission is alleged to be used, has concluded his evidence, will be of no avail and cannot be utilized against him.

20. Thus, even though the 3rd defendant did not examine himself as a witness on the side of the defendants, when the plaintiff wanted to take advantage or rely upon the 3rd defendant's evidence before the criminal



S.A.No.618 of 2017

Court, the said evidence could not have been received by the First Appellate Court, without giving an opportunity to the 3rd defendant to explain the contradiction or ambiguity.

21.Mr.T.Murugamanickam, learned Senior Counsel for the respondent would state that since the 3rd defendant is a party to the suit, he cannot be compelled to give evidence. Though, the learned Senior Counsel may be right in advancing such an argument, in the peculiar facts of the present case, it is noticed that the application filed before the Trial Court was only to mark the very same deposition through P.W.1. The said application was rejected and the plaintiff did not choose to prefer any Appeal or Revision against the said order and allowed it to become final. However, invoking Order XLI Rule 27 of CPC in the First Appeal, the plaintiff, as appellant, has sought to mark the deposition of the 3rd defendant as additional evidence, which request has been accepted by the First Appellate Court.

22.Order XLI Rule 27 of the CPC reads thus:

“Production of additional evidence in Appellate Court

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, But if—



S.A.No.618 of 2017

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

¹[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

It is clear from the above that the party seeking to produce additional evidence has to establish that notwithstanding exercise of due diligence, he could not file such evidence before the Trial Court or that such evidence was not within his knowledge or that despite exercise of due diligence, he could not produce the same before the Trial Court.

23. Here, the plaintiff cannot state that he did not have knowledge of the evidence. In fact, even in the plaint, he has pleaded about the stand taken



S.A.No.618 of 2017

by the 3rd defendant before the criminal Court and he himself sought to mark the said deposition of the 3rd defendant through P.W.1. Therefore, the plaintiff has not satisfied the mandate of Rule 27 (aa) of Order XLI CPC. Even if the plaintiff seeks to come within the purview of Sub Rule 1(a) stating that the Trial Court has refused to admit evidence which ought to have been admitted, when the plaintiff had specifically made a request by way of an Interlocutory Application and the said application was dismissed, the remedy open to the plaintiff was to challenge the said order. However for reasons best known to the plaintiff, he allowed the said order to become final and in the appellate stage, he cannot take advantage of the dismissal of the application and state that the Trial Court had refused to admit evidence, which ought to have been admitted.

24. In fact, Rule 27 (1)(b) of Order XLI of the CPC enables the Appellate Court to receive any additional evidence which the Appellate Court requires for pronouncing judgment, or for other substantial cause. Here, in the instant case, the First Appellate Court has given reasons for accepting the additional evidence and has felt that the deposition of the 3rd defendant in the criminal case would be required for examining the issues at hand, to enable judgment to be pronounced.



S.A.No.618 of 2017

WEB COPY

25.I have gone through the memorandum of grounds of Second Appeal. The order passed in I.A.No.32 of 2017 has not been specifically challenged by raising grounds which is permissible under Section 105(1) of CPC which enables challenging any order against which, no appeal lies, by setting forth the ground for objection in the memorandum of appeal. Here, as already noticed, the order in I.A.No.32 of 2017 has not been challenged in the memorandum of grounds of Second Appeal. However, the same has been raised as a substantial questions of law suggested, which is extracted hereunder:

“Whether in law, the Lower Appellate Court was right in allowing I.A.No.32 of 2017 for receipt of additional evidence, without giving an opportunity to the appellants to disprove it under Section 157 of the Indian Evidence Act.”

26.Mr.T.Murugamanickam, learned Senior Counsel appearing for the respondent would submit that raising the issue by way of substantial questions of law would not amount to raising a ground of appeal and it must be a ground of objection in the memorandum of the grounds of appeal as



S.A.No.618 of 2017

required under Section 105(1) of CPC. However, Mrs.Hema Sampath, learned Senior Counsel appearing for the appellants would on the contrary, argue that the substantial questions of law are also part of the grounds of appeal and therefore, the appellants cannot be non-suited on the ground that the issue has not been raised as a specific ground in the memorandum of grounds of appeal, even though it is suggested by way of a substantial question of law.

27.I am in agreement with the contentions put forth by Mrs.Hema Sampath, learned counsel for the appellants. The questions of law are also grounds of challenge raised by the appellant in the Second Appeal. They form part of the grounds of appeal and are not independent of the memorandum of grounds of Second Appeal. Thus, when the memorandum of grounds specifically has raised the ground, though as a substantial question of law arising in the Second Appeal, I find that there is a specific challenge laid to the order passed by the First Appellate Court in I.A.No.32 of 2017. Thus, I am inclined to decide the correctness of the order passed by the First Appellate Court in I.A.No.32 of 2017.



S.A.No.618 of 2017

WEB COPY

28. In view of the earlier discussion and also the law laid down by the Hon'ble Supreme Court, the evidence of the 3rd defendant if at all was sought to be marked, it should have been by calling the 3rd defendant himself, who was very much available as a party defendant. It is not something which can be equated to a case where the party to the suit cannot be compelled to give evidence because this is a peculiar case where the plaintiff wanted to mark the deposition of the 3rd defendant before a criminal Court. This exercise was undertaken before the Trial Court and being unsuccessful, it was renewed in a different form before the First Appellate Court, by way of an application under Order 41 Rule 27 of CPC. When the First Appellate Court decided to mark the said deposition of the 3rd defendant, in a criminal case, it ought to have given an opportunity to the 3rd defendant to explain the contradictions and ambiguities which are sought to be taken advantage of by the plaintiff. Without doing so, the First Appellate Court ought not to have relied on the evidence, namely, Ex.A18. The procedure therefore adopted by the First Appellate Court is clearly irregular and is unsustainable in the eye of law.



S.A.No.618 of 2017

29. Even assuming that the evidence of the 3rd defendant in the criminal case was supporting the case of the plaintiff and could be received as evidence to establish the existence of the joint family property, the said statement of the 3rd defendant would not by any stretch of imagination bind the 1st defendant. The properties admittedly stand in the name of the 1st defendant, the father. It is the specific case of the 1st defendant that both the items of suit properties are his self acquired properties and not joint family properties. Therefore, any amount of evidence let in by the 3rd defendant, whether before this Court or before the criminal Court, would not bind his father, the 1st defendant and give leverage to the Civil Court to hold that the property is a joint family property, merely because the 3rd defendant has contradicted his earlier statement in the present suit proceedings.

30. Thus, for all the above reasons, the substantial questions of law 2 and 4 are answered in favour of the appellants. Coming to the substantial questions of law 1 and 3, though the plaintiff has pleaded that the properties are joint family properties and he contributed his income for the purchase and also construction of the building, there is absolutely no shred of evidence adduced by the plaintiff to establish such contentions.



WEB COPY

31. In the case of ***S.Subramanian Vs. S.Ramasamy*** reported in (2019) 6 SCC 46, the Hon'ble Supreme Court held that even though the properties are separate properties or self acquired properties of a member of a Joint Hindu Family, it can be impressed with the character of joint family property, by voluntarily throwing by the said owner, into the common stock with an intention of abandoning his separate claim over the property. Such plea of blending can be accepted only when it is established or proved.

32. The Hon'ble Supreme Court also held that abandonment cannot be inferred from merely allowing other family members to use the property or income of the separate property out of generosity to support the family members. Similarly, in ***P.R.Kannaiyan Vs. Ramasamy Mandiri*** reported in (2005) 4 CTC 457, the Division Bench of this Court held that even in a case where the Kartha has separate and independent property, the burden of proving that the property is a joint family property is always on the person who claims that such acquisition in the name of the Kartha is joint family property, which was acquired by availability of sufficient surplus from joint family property/income accruing there from.



S.A.No.618 of 2017

33. Admittedly, in the present case, the plaintiff has not been able to show any acceptable piece of evidence that he contributed for either the purchase of the suit property or for construction/development of the properties. The Trial Court has rightly considered the oral and documentary evidence available on record and held that the plea of joint family property raised by the plaintiff was totally untenable and liable to be rejected. However, the First Appellate Court has curiously relied on Ex.A1, the Sale Deed in and by which an ancestral house was sold for a sum of Rs.3,500/- in 1989 to impute existence of joint family property, namely, the suit schedule properties. The First Appellate Court clearly fell in error for the simple reason that the acquisitions by the father, namely, the 1st defendant was admittedly in 1973 (Item -2) and between 1978 and 1981 (Item -1). Moreover it is also the specific case that the sale consideration of Rs.3,500/- from sale of the property under Ex.A1 in 1987 was used only for clearing debts. There was absolutely no nexus whatsoever between the sale of the property in Ex.A1 and the purchase of the properties much earlier in 1973 and between 1978 and 1981. In the absence of any satisfactory material produced by the plaintiff, the First Appellate Court has presumed existence of joint family property which is clearly unsustainable in law and against



S.A.No.618 of 2017

well settled principles laid down by the Hon'ble Supreme Court as well as this Court.

34.Though the learned Senior Counsel for the respondent relied on the decision of the Hon'ble Supreme Court in ***Kale and Others Vs. Deputy Director of Consolidation and Others*** reported in ***1976 3 SCC 119***, wherein the Hon'ble Supreme Court was confronted with a case where there was a family arrangement amongst the family members descending from a common ancestor and in order to settle the differences and disputes, they had entered into a family arrangement. While deciding the said issue, the Hon'ble Supreme Court held that the family arrangement can be made by way of a written or unwritten arrangement as well, subject to the written arrangement, merely recording past oral partition, as long as the said written arrangement or memorandum did not create or extinguish any rights in the immovable property under the said document. This decision would also not come to the rescue of the respondent/plaintiff. Thus, I am inclined to answer the two substantial questions of law 1 and 3 also in favour of the appellant.



S.A.No.618 of 2017

WEB COPY

35.In fine, the Second Appeal is allowed, the judgment and decree of the First Appellate Court dated 12.06.2017 in A.S.No.88 of 2016 is set aside and the judgment and decree of the Trial Court dated 15.07.2016 in O.S.No.45 of 2010 is restored to file. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is closed.

01.03.2024

Index : Yes/No
Speaking Order/Non-Speaking Order

ata

To

- 1.The Principal District Court, Erode.
- 2.The Sub Court, Gobichettipalayam.
- 3.The Section Officer,
VR Section,
High Court, Madras.



WEB COPY



S.A.No.618 of 2017

P.B.BALAJI, J.

ata

Pre-delivery judgment made in

S.A.No.618 of 2017

01.03.2024