

(2002) 11 MAD CK 0110

Madras High Court

Case No: S.A. No. 1151 of 2002 and C.M.P. No's. 9442, 9443 and 14945 of 2002

N. Rathina Reddy, Rukmani
Ammal, Sakuntala, M. Doss and
Pappathi Ammal

APPELLANT

Vs

N. Rani Ammal, Kumuthavelli,
Prakash, N. Loganatha Reddy, N.
Shanmuga Reddy, M. Sriramulu,
Kanniammal and K.
Subramaniam

RESPONDENT

Date of Decision: Nov. 1, 2002

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 27, Order 41 Rule 27(1)

Citation: (2003) 1 MLJ 190 : (2003) 1 RCR(Civil) 576

Hon'ble Judges: N.V. Balasubramanian, J

Bench: Single Bench

Advocate: S. Mahimai Raj, for the Appellant;

Final Decision: Dismissed

Judgement

1 The second appeal arises out of the judgment and decree dated 29.11.2000 rendered in A.S.No.61 of 1993 on the file of the Subordinate Judge, Kanchipuram confirming the judgment and decree 11.12.1992 in O.S.No.249 of 1983 on the file of the District Munsif, Tiruttani.

2. The plaintiffs filed the suit for partition. The first plaintiff is the widow of one Thangavel Reddy and the second plaintiff is her minor daughter and third plaintiff is her minor son. The case of the plaintiffs is that there was a joint family consisting of one Somu Reddy and his three sons, viz., Manicka Reddy (second defendant's husband), Rathna Reddy (the first defendant) and Thangavel Reddy (the first plaintiff's husband). It is the case of the plaintiffs that the suit properties are joint

family properties belonging to the joint family of Somu Reddy. The case of the plaintiffs is that the first plaintiff's husband Thangavel Reddy died two years prior to the institution of the suit and after his death, other members of the family refused to give the share due to the plaintiffs and hence, they filed the suit for partition on the ground that the first plaintiff's husband, Thangavel Reddy was one of the male members of the joint family and he would be entitled to a share in the joint family properties and on his death, his properties devolved on the plaintiffs and they should be allotted the properties due to Thangavel Reddy by way of partition.

3. As already observed, the first defendant is one of the sons of Somu Reddy and the second defendant is the widow of deceased Manicka Reddy the eldest son of Somu Reddy, and the defendants 3 and 4 are his children. The fifth defendant is the widow of the deceased Kartha, Somu Reddy and other defendants are alienees of some of the joint family properties. The case of the defendants as pleaded in the written statement filed initially on 19.7.1984 was that there was a family arrangement followed by a deed which was marked as Ex.B-2 and in the family arrangement, the properties were allotted and therefore the suit for partition is not maintainable. The defendants, in the written statement filed on 6.4.1992, took another plea that Somu Reddy had four sons and apart from Manicka Reddy, Thangavel Reddy and Rathna Reddy, he had one another son, by name, Ekambara Reddy who died in the year 1962 when he was 17 years old and therefore, in any event, the plaintiffs would be entitled to a lesser share than that claimed in the plaint.

4. The trial Court and the first appellate Court found that the deed of family arrangement as pleaded by the defendants was not true. Both the Courts have concurrently found that under the document Ex.B-2, the immovable properties were allotted in favour of the family members and therefore, it should have been registered under the provisions of the Registration Act. Both the Courts have found that in the absence of registration of the document, Ex.B-2, the document can not be looked into. Both the Courts have considered that even if the document was taken as a family arrangement and the document could be looked into for incidental purposes. it was found that there is absolutely no evidence to show that the properties were actually divided and the parties were enjoying the properties separately subsequent to the alleged family arrangement. Both the Courts took note of the subsequent events and came to the conclusion that there is no evidence to show the separate enjoyment of the properties and the case pleaded by the defendants that there was a family arrangement in 1975 was not true and cannot be accepted. I hold that the finding of the trial Court which was confirmed by the first appellate court is justified as the said finding is based on evidence on record. Both the Courts have found that the document, Ex.B-2 required registration as by that document, and if the properties were allotted, in the absence of registration, the document cannot be relied upon. Further it was found that there is absolutely no evidence to show that the properties were actually allotted in favour of the members as indicated in the document and there is also no evidence to show that

the members were in separate and absolute enjoyment of their respective shares after the alleged partition which shows that the deed is not a genuine one. I therefore hold that the finding regarding the family arrangement arrived at by the trial Court as well as the first appellate court is purely a factual finding as it is based on evidence and I am not inclined to interfere in the said finding.

5. Learned counsel for the appellants strenuously argued that the mother-in-law of the first plaintiff, viz., the fifth defendant was examined as D.W.3 and she has deposed that she had another son, by name, Ekambara Reddy and when D.W.3, the mother, has stated that she had one another son, Ekambara Reddy, both the Courts were not correct in holding that the defendants have not proved that Somu Reddy had four sons including Ekambara Reddy. The trial Court has found that the defendants did not raise the plea regarding the existence of another son of Somu Reddy, by name, Ekambara Reddy in the reply notice issued by them to the suit notice. It was also found by the trial Court that in the written statement initially filed by the defendants in the year 1984, the defendants have not raised the plea that Somu Reddy had four sons including Ekambara Reddy. When the first plaintiff was examined as P.W.1, no answer was elicited from her regarding the existence of another son, Ekambara Reddy. The case of the plaintiffs throughout was that Somu Reddy had three sons and when the first plaintiff was examined, the defendants have not even suggested to her that Somu Reddy had four sons including Ekambara Reddy. That apart, when the first defendant, one of the sons of Somu Reddy was examined, he has also not stated either in his chief-examination or cross-examination that Somu Reddy had four sons including Ekambara Reddy. It was, only D.W.3 the widow of Somu Reddy, has spoken about the existence of another son, Ekambara Reddy. Probably, at the time of her examination, the written statement was sought to be amended in 1992, but the defendants have not produced any evidence to show that Somu Reddy had another son, by name, Ekambara Reddy. Both the Courts have found that the defendants have not produced any evidence such as, the birth certificate of Ekambara Reddy or the school certificate had Ekamabaram been to the school. It is also seen that the defendants have not produced the family card to show that Somu Reddy had another son, by name, Ekambara Reddy. The defendants have also not examined any independent witness who was conversant with the affairs of the family of Somu Reddy to show that Somu Reddy had another son, Ekambara Reddy. In the absence of any evidence from the side of the defendants and taking into account the conduct of the defendants in not raising such a plea earlier either in the reply notice or in the written statement initially filed, both the Courts have concurrently found that the defendants have failed to prove that Somu Reddy had another son, Ekambara Reddy.

6. Learned counsel for the appellants vehemently argued that both the Courts were not correct in not accepting the evidence of D.W.3, wife of the deceased Somu Reddy. However, I hold that on the facts and circumstances of the case, both the

Courts were correct in holding that the defendants have not established by acceptable evidence that Somu Reddy had another son, by name, Ekambara Reddy. Both the Courts have given cogent and convincing reasons to come to the conclusion that the defendants have failed to prove that Somu Reddy had another son, by name, Ekambara Reddy. In the circumstances, I confirm the finding of both the Courts below that Somu Reddy had only three sons, viz., first plaintiff's husband, first defendant and the second defendant's husband.

7. The trial Court has also found that except items 13,19,22,23, 24, 27 and 29 of A-schedule properties, all other items are joint family properties. In so far as the rejection of the prayer for partition by the trial Court in respect of items 13, 19, 22,23, 24, 27 and 29 of A-schedule properties is concerned, the plaintiffs have not preferred any appeal. As far as other items are concerned, even according to the defendants they are joint family properties and once the plea of the defendants that there was a family arrangement was not proved, the plaintiffs would be entitled to a share in respect of those items as determined by the trial Court and confirmed by the first appellate Court.

8. Learned counsel for the appellants filed two petitions, viz., C.M.P.Nos.9442 and 14945 of 2002. C.M.P.Nos.9442 of 2002 is filed to permit the appellants to produce photo of Ekambara Reddy and the certificate dated 16.5.2001 issued by the Headmaster, Panchayat Union Elementary School, Velligaram village, Pallipattu taluk as additional evidence. C.M.P.No.14945 of 2002 is filed to issue direction to the Headmaster, Panchayat Union Elementary School, Velligaram village, Pallipattu taluk, Tiruvallur District to produce the admission register and other related records showing the admission and study of Ekambara Reddy son of Somu Reddy up to V Standard, completed on 1.6.1955. As far as these petitions are concerned, I am unable to accept the case of the petitioners/appellants. Learned counsel for the petitioners submitted that the additional documents should be considered. I have already found that the defendants have not taken up the plea that Somu Reddy had one another son, by name, Ekambara Reddy either at the time of issue of reply notice to the suit notice or in the written statement originally filed in the year 1984. The plea was subsequently taken in the additional written statement. The defendants have not produced any evidence at all to show that Somu Reddy had another son, by name, Ekambara Reddy. In the absence of any evidence produced before the trial Court or even before the first appellate Court, in my view, it is not open to the petitioners/appellants to produce certain documents at the time of hearing of the second appeal.

9. In KAMALAM,N.(d) & ANR. v.AYYASAMY & ANR. 2002 1 L.W. 460, the Supreme Court has considered the provisions of Order XLI, Rule 27 of the CPC which prescribes the specific situation when the question of production of additional evidence may be heard and held as under:-

" ... the provisions of Order 41, Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the Court of Appeal - It does not authorise any lacunae or gaps in evidence to be filled up. The authority and jurisdiction as conferred on the Appellate Court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way. This Court in [Municipal Corporation for Greater Bombay Vs. Lala Pancham of Bombay and Others](#), , has been candid enough to record that the requirement of the High Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronouncement judgment. In paragraph 9 of the judgment, this court observed:

".... This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only of removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. The High Court does not say that there is any such lacuna in this case. On the other hand what it says is that certain documentary evidence on record supports "in a large measure" the plaintiffs' contention about fraud and mala fides. We shall deal with these documents presently but before that we must point out that the power under Cl.(b) of Sub-r.(1) of R.27 cannot be exercised for adding to the evidence already on record except upon one of the ground specified in the provision."

Further in [Smt. Pramod Kumari Bhatia Vs. Om Prakash Bhatia and Others](#), , this Court also in more or less in an identical situation laid down that since an application to the High Court has been made very many years after the filing of the suit and also quite some years after the appeal had been filed before the High Court, question of interfering with the discretion exercised by the High Court in refusing to receive an additional evidence at that stage would not arise. The time lag in the matter under consideration is also enormous and the additional evidence sought to be produced was a matter of fact after a period of 10 years after the filing of the appeal. Presently, the suit was instituted in the year 1981 and the decree herein was passed in 1983. The first appeal was filed before the High Court in April, 1983 but the application for permission to adduce additional evidence came to be made only in August, 1993. Needless to record that the Courts shall have to be cautious and must always act with great circumspection in dealing with the claims for letting in additional evidence particularly, in the form of oral evidence at the appellate stage and that too, after a long lapse of time. In our view, a plain reading of Order 41, Rule 27 would depict that the rejection of the claim of production of additional evidence after a period of 10 years from the date of filing of the appeal, as noticed above, cannot be termed to be erroneous or an illegal exercise of discretion. The three limbs of Rule 27 do not stand attracted."

In my view, the ratio of the decision of the Supreme Court in Kamalam's case would apply as additional documents are sought to be produced after a period of nearly 20 years as the suit was instituted in the year 1983 and the appellants have not produced the evidence either before the trial Court or before the first appellate Court. As observed by the Supreme Court, the jurisdiction of the appellate court to receive additional evidence is limited to such cases where it is found necessary to obtain such evidence for enabling the Court to pronounce judgment. On the facts of the case, the additional documents are not required to pronounce judgment. In the view I am taking, I am not expressing any opinion on the genuineness of the document as the photograph, which should have been taken prior to 1962, is produced without the negative and it is not clear as to how the Headmaster of the Panchayat Union Elementary School is able to state that Ekambara Reddy was a student of the said institution from 1948 to 1955. Accordingly, the petitions, C.M.P.Nos.9442 and 14945 of 2002 filed after a period of 20 years from the date of institution of suit are belated and both the petitions are rejected.

10. Consequently, I hold that no question of law, much less a substantial question of law arises out of the judgment and decree of the first appellate Court confirming the judgment and decree of the trial Court.

11. In the result, the second appeal is dismissed, in limine, at the admission stage itself. Consequently, C.M.P.No.9443 of 2002 is closed.