K.P. Madhavan Vs K.P. Anandan and Others

S.A. No. 662 of 1991 and C.M.P. No. 6053 of 1991

Court: Madras High Court

Date of Decision: Dec. 9, 2009

Hon'ble Judges: M. Jeyapaul, J

Bench: Single Bench

Advocate: M. Devendran, for the Appellant; T.M. Hariharan, for R-1, for the Respondent

Final Decision: Dismissed

Judgement

M. Jeyapaul, J.
The second defendant is the appellant herein.

2. The first respondent/plaintiff has filed the suit praying for partition of the suit property and allot one-seventh share to him. He has also prayed for

mesne profits.

3. The first defendant Padmavathi is the wife of late V.K. Palani. The second defendant and the plaintiff are the sons and the defendants 3 to 6 are

the daughters of V.K. Palani.

4. The plaintiff would contend in the plaint that his father V.K. Palani left behind him a tiled house bearing Door No. 10, Nelsonmanickam Road,

Chennai-94. After the demise of V.K. Palani, the plaintiff and the second defendant constituted a Hindu joint family and improved the said

property. Though the joint family properties are undivided, the plaintiff and the second defendant started living separately from the year 1977. The

properties are under the management of the second defendant. Alleging that there was no proper response from the second defendant for the

demand for partition of the properties by metes and bounds, the plaintiff prays for division of the property and allotment one-seventh share therein.

5. The third to sixth defendants remained exparte before the Trial Court proceedings. The first defendant Padmavathi filed written statement, but

she did not participate in the further trial proceedings. The written statement filed by the first defendant would go to show that she virtually

supported the case of the second defendant.

6. The second defendant would contend in the written statement separately filed by him that the tiled house bearing Door No. 10,

Nelsonmanickam Road, Chennai-94 is the self-acquired property, absolutely belonging to the second defendant. The plaintiff had no earnings at

the time when the suit property was acquired by the second defendant. The plaintiff after the demise of V.K. Palani left the second defendant to set

up a separate house at Kodambakkam. V.K. Palani put up a thatched shed in the suit property which is a poromboke land. The Government

removed the same in the year 1948 itself. The second defendant was employed in Ashok Leyland for about three years. With his own earnings he

put up a thatched shed in the poromboke land. Thereafter, the second defendant joined the Indian Railways and having removed the hut, he put up

a Mangalore tiled house out of his own earnings. In the year 1981, he built a pucca building out of his own earnings and also by borrowing loans

from friends and money lenders. The plaintiff has no manner of right over the suit property. Therefore, he prays that the suit may be dismissed.

7. The Trial Court having adverted to the evidence on record returned a finding that the super-structure was put up by the second defendant from

the funds mobilized by him and that the plaintiff is not entitled for a share in the suit property as pleaded by him.

8. The First Appellate Court having set aside the findings of the Trial Court held that the super-structure of the suit site which is a poromboke land

was assigned in favour of V.K. Palani and the super-structure was put up out of the joint family funds. It has been observed therein that the plaintiff

has also contributed for the construction of the super-structure in the suit property. Consequently, the prayer for mesne profits was rejected by the

First Appellate Court.

9. The following substantial questions of law were formulated by this Court at the time of the admission of the second appeal for determination:

1. Whether there has been a proper appreciation and application of the principles for holding that a property standing in the name of an individual,

shall acquire the character of a joint family property so as to be available for partition.

2. Whether the Lower Appellate Court misconstrued or omitted to construe the material evidence on record when it chose to reverse the

Judgment and decree of the Court below.

10. The learned Counsel appearing for the second defendant would contend that Ex.B28, account book maintained by the second defendant,

Ex.B36 account particulars maintained in a separate sheet by the second defendant, Ex.B37 the bills numbering 53 showing the purchase of

construction materials and Ex.B38 receipts numbering 28 showing purchase of construction materials would go to establish that it was only the

second defendant who constructed the super-structure by contributing his earnings. The communications received from the Tahsildar, Collector

and Deputy Secretary to Government of Tamil Nadu respectively under Exs. B29, B30 and B31 would establish that it was only the second

defendant who was reminded of the construction put up by him in a Government land and was directed to stop construction. He would submit that

if at all the second defendant had put up construction in the suit property, there would have been no occasion for the Government authorities to

direct him to stop construction of the super-structure. It is his further submission that the plaintiff did not file documents to show that he contributed

anything for the super-structure put up in the suit property. The plans Exs. A4 and A5 were not approved plans. It is submitted that the xerox copy

of the affidavit was simply produced before the Trial Court. Even in the said affidavit, there is a reference that it was only the second defendant

who had proposed to put up construction in the suit site, if at all V.K. Palani was assigned with the suit property there would have been no

occasion for the Government authorities to issue communications under Exs. B29, B30 and B31 directing the second defendant to stop

construction in the suit site. The last submission made by the learned Counsel appearing for the second defendant is that even assuming for the sake

of argument that the site infact belongs to the joint family, the second defendant can very well establish that the superstructure is his self-acquisition.

Inasmuch as he has established that he has put up construction in the suit site from out of his own earnings, the plaintiff cannot have any division of

the structure put up out of the earnings of the second defendant. Therefore, he would submit that the Judgment of the First Appellant Court

warrants interference.

11. The learned Counsel appearing for the plaintiff/first respondent would submit that the second defendant who has come out with a plea that in

the year 1948 itself, encroahment made by V.K. Palani was removed by the Government has completely given up that case and has projected a

new case during the course of Trial Court of the case. Referring to Ex.A31 dated 26.05.1941 he would submit that V.K. Palani was directed by

the Government authorities to pay Rs. 3 per square foot aggregating to Rs. 72 for assignment of the suit site which was found to be in his

encroachment. Referring to Exs. A6 and A7 he would submit that V.K. Palani paid B-memo charges in the years 1945 and 1946. Referring to the

other documents on record, he would submit that the suit site was assigned in favour of V.K. Palani as found from the extract of survey and

settlement records Ex.A30 and property demand notice was issued by the authorities concerned not only to the second defendant but also to the

first defendant and the plaintiff. Referring to the affidavit filed by the second defendant in the earlier suit proceedings and the joint undertaking given

by the plaintiff, first defendant and second defendant under Ex.A47, he would submit that the construction was made not only by the second

defendant but also by the other members of the family. Therefore, he would submit that the Judgment of the First Appellate Court deserves to be

confirmed.

12. It is true that the second defendant had maintained an account book and account particulars in separate sheets as found from Exs. B28 and

B36. He has also chosen to produce 53 bills and 28 receipts marked as Exs. B37 and B38 to establish before the Court that he had contributed

his mite for procuring construction materials. The aforesaid documents would go to show that he had of course contributed for the construction of

the super-structure in the suit property. The question that arises for consideration is whether the super-structure in the suit site was put up

exclusively by the second defendant or by the entire family members. It is true that the Tahsildar, the Collector and the Deputy Secretary to the

Government of Tamil Nadu under the proceedings Exs. B29, B30 and B31 directed the second defendant to stop construction in the suit site as it

was a Government poromboke land belonging to the Government. But on a careful perusal of the extract of survey and settlement records marked

as Ex.A30 dated 03.12.1971, it is found that V.K. Palani was shown as the rightful owner of the suit property. The proceedings Exs. B29 to 31

issued by the Government authorities referred to above are found to be quite against the spirit of the entry found in the survey and settlement

records marked as Ex.A30. Of course no document was produced before the Court that the second defendant effectively challenged the

communications which he received from the Government authorities under Exs. 29 to 31 to stop construction in the site which was already

assigned to his father under Ex.B30. But at any rate, the communications sent by the Government authorities under Exs29 to 31 would not dilute

the right found to have been conferred as per the entry found in the extract of survey and settlement records Ex.A30.

13. Ex.A41 a letter shot off by the second defendant to his mother, the first defendant on 10.08.1982 would go to show that he has instructed his

mother to associate the plaintiff also in the matter of white washing the building put up in the site. Therefore, we cannot jump to a decision based on

the materials Exs. B28, B36, B37 and B38 produced by the second defendant that the plaintiff did not contribute anything for the construction of

the super-structure in the suit site.

14. I find that the plaintiff has produced voluminous documents to establish that originally V.K. Palani encroached upon the suit site which was a

Government poromboke land and that the plaintiff having paid B-memo charges chose to remit the value of the site as fixed by the Government

and got the assignment in his name.

15. Ex.A31 dated 26.05.1941 would go to establish that V.K. Palani was directed by the Government authorities to pay Rs. 3 per square feet

aggregating to Rs. 72 to get assignment as prayed for by him in his application. Thereafter, under Exs. A6 and A7 V.K. Palani chose to pay B-

memo charges for the enjoyment of the suit site which was a poromboke land on 12.05.1945 and 09.01.1946. He was directed under Ex.A8

dated 30.12.1955 to pay encroachment charges. The afore detailed documents produced on the side of the plaintiff would go to establish that the

second defendant has come out with a false defence that the encroachment made by his father V.K. Palani was removed by the Government way

back in the year 1948.

16. Under Ex.A11 dated 05.02.1965 the corporation authority had thought it fit to issue property assessment notice not only to the second

defendant but also to the plaintiff and the first defendant directing them to pay the property tax for the tiled house in the suit property. Ex.A10

dated 20.03.1965 would go to establish that property tax was assessed not only in the name of the second defendant but also in the name of the

plaintiff and the first defendant. Ex.A30 dated 03.12.1971 the extract of survey and settlement records would go to show that Ryotwari rights over

the Government poromboke site was conferred on V.K. Palani. The aforesaid documents completely disarm the defence of the second defendant

that V.K. Palani was removed from encroachment and the second defendant who encroached upon the suit site afresh put up a tiled house out of

his own earnings.

17. Ex.A24 dated 31.07.1976 would go to show that the plaintiff and the second defendant chose to jointly submit a petition to the Governor for

issuing assignment in their names. Had the second defendant become the exclusive encroacher of the suit poromboke site there would have been

no occasion for the second defendant to associate the plaintiff also to submit a joint petition to the Governor for the purpose of giving assignment

under Ex.A24.

18. Under Ex.A12 dated 30.12.1977, a demand notice was issued by the authorities to the first defendant and others. It is true that Exs. A4 and

A5 plan had not indicated that they received the seal of approval of the authorities concerned. On a careful scrutiny of Exs. A4 and A5 it is found

that the plaintiff as well as the second defendant had subscribed their signatures to the said plan. Though those plans were attacked on the ground

that they were not approved plan, it is found that the second defendant chose not to dispute his signature found in Exs. A4 and A5. The other

documents consequentially come into existence would santify the veracity of Exs. A4 and A5.

19. Under Ex.A46 dated 04.03.1978 the second defendant chose to submit an affidavit before the Urban Land Ceiling Authority. He

unambiguously declared in the affidavit Ex.A46 that he was one of the joint share holders of the suit property. If at all the second defendant had

become the absolute encroacher of the suit property, there would have been no occasion for him to declare that he was just one of the joint share

holders of the suit property. To top it all under Ex.A47 dated 13.03.1978 a joint undertaking was given not only by the second defendant but also

by the plaintiff and the first defendant that they had proposed to construct a building in the suit site. Ex.A47 deals a death blow to the case of the

second defendant that it was he who put up exclusive construction in the suit property.

20. Ex.A40 dated 29.06.1978 is a common Judgment pronounced in the eviction proceedings initiated by the second defendant as against three

tenants in occupation of the suit property. The pleadings of the second defendant is found incorporated in the said common Judgment. It appears

that the second defendant had set up a plea in the eviction proceedings initiated by him as against three tenants in occupation of the suit property

that the suit property was the property, jointly owned by the family of V.K. Palani. Even after the new pucca construction was made in the suit

property, it is found that the property tax was assessed not only in the exclusive name of the second defendant but also in the name of the plaintiff

and the first defendant as found under Ex.A42 dated 04.12.1987.

21. It is true that the plaintiff has not produced telling materials to show that he in fact purchased any construction materials from out of his own

earnings. But the clinching documents referred to above produced on the side of the plaintiff would go to establish that the construction was made

not by an individual, but by the joint family.

22. The learned Counsel appearing for the second defendant refers to a decision in A.L.P.R. Periakaruppan Chetti Vs. R.M.P.R. Arunachalam

Chetti and Another, wherein it has been held that:

when a person build a house when his self-acquisitions on a land which is ancestral in nature with the knowledge of the other persons who had right

in the said land the said site and building should be alloted to the person who build up the super-structure.

23. In yet another case in Kashinath Das Vs. Pravash Chandra Das and Others, the Calcutta High Court has held that:

There was no question of throwing the self-acquired property into the common stock to make it form part and joint family property when the

mother had allowed the son to build a house in her property, it cannot be claimed by the construction made by the son would belonging to the

mother.

24. Firstly, on facts, it is found that the plaintiff has established in the instant case that the construction in the suit site was not made exclusively by

the second defendant but the same was put up by the members of the family. Secondly, in the aforesaid case many properties were involved in a

suit for partition and one of the share holders who had put up construction with his own earnings sought allotment of the site along with the

construction put up by him. The aforesaid ratio laid down by this Court as well as the Calcutta High Court would not apply to the facts and

circumstances of this case.

25. The Trial Court, it appears, have been completely guided by the account books, bills and receipts produced by the second defendant, ignoring

completely the other material documents produced by the plaintiff, wrongly held that the pucca construction in the suit site was constructed only by

the second defendant and not by the other family members. The First Appellate Court adverting to the entire materials on record in the right

perspective has correctly returned a finding that the suit site was assigned in the name of V.K. Palani and the super-structure in the suit site was put

up not only by the second defendant but also by the plaintiff and the first defendant. There was no misconstruction of the material evidence on

record by the First Appellate Court. The plaintiff has established that the ryotwari right in the suit site was given to his father and the entire family

which came into possession of the suit site put up a pucca construction whereas, the second defendant failed to establish that the suit site as well as

the superstructure standing therein belonged to him.

26. In view of the above, the plaintiff is entitled to one-seventh share in the suit property as determined by the First Appellate Court.

27. Therefore, confirming the Judgment of the First Appellate Court the second appeal stands dismissed. There is no order as to costs.