(2011) 10 MAD CK 0108

Madras High Court

Case No: Second Appeal No. 1068 of 2011 and M.P. No''s. 1 and 2 of 2011

S. Sundari, Shanmugam and Angayee		APPELLANT
	Vs	
S. Periyasamy		RESPONDENT

Date of Decision: Oct. 31, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 13 Rule 4
- Registration Act, 1908 - Section 49
- Stamp Act, 1899 - Section 35, 36

Hon'ble Judges: R.S. Ramanathan, J

Bench: Single Bench

Advocate: Raguvaran Gopalan, for the Appellant; P.M. Duraiswamy, for the Respondent

Final Decision: Dismissed

Judgement

R.S. Ramanathan, J.
The unsuccessful defendants are the appellants.

2. The respondent/plaintiff filed the suit for declaration that he is the absolute owner of the suit property and for injunction. The case of the respondent/plaintiff was that the suit property and other properties originally belonged to one Palani and he had a son by name Maran and the said Maran had four sons by name Maran, Chellappan, Munian and Shanmugam and one of the sons Chellappan died leaving behind his widow Valliammal and son Ramasamy and on 11.3.2001, Shanmugam, Munian, Ramaasamy and Maran divided the properties as per the decision of the panchayat and they were in possession of the property and the suit property was allotted to the share of Maran and Ramasamy and the plaintiff purchased the same on 23.1.2008 from the owners Maran and Ramasamy and therefore, the plaintiff is entitled to declaration.

3. The appellants contested the suit disputing the partition dated 11.3.2001 and set up a plea of earlier partition in the year 2000 and as per the earlier partition, the suit property was allotted to Shanmugam and Munian and the plaintiff''s vendors were allotted property on the eastern side of the suit property and the appellants/defendants are enjoying the suit properties and they have also constructed a house and are paying kist therefor and therefore, the suit for declaration is not maintainable and the plaintiff will not get any title under the sale deed dated 23.1.2008 as his vendors did not have title to that property.

4. The Trial Court decreed the suit holding that there was a partition among the brothers on 11.3.2001 and as per the partition as evidenced by Ex.A2, the suit properties were allotted to the share of the vendors of the plaintiff and therefore, the plaintiff is entitled to the decree. The first appellate court held that Ex.A2 partition is not admissible in evidence and cannot be looked into as it is an unregistered instrument. Nevertheless the lower appellate court confirmed the judgment and decree of the Trial Court and dismissed the appeal. Hence, the second appeal.

5. The following substantial questions of law were framed at the time of admission of the second appeal:

1. Whether the burden of proof of showing that the plaintiff had ownership and possession of the schedule property had been sufficiently discharged to merit a shift in the onus of proof?

2. Whether a prima facie case was established by the plaintiff so as to merit the shifting of the onus of proof on to the defendants?

3. Whether the onus of proof can be shifted on to the defendants to show that their claims of ownership and possession of the schedule property has been established when the evidence adduced by the plaintiff has been discredited/disallowed in its entirety?

4. Whether the suit can be decreed entirely on the basis of the weakness in the case of the defendants when the plaintiff has failed to adduce proper evidence to establish his case and failed to discharge the burden of proof on the pleadings?

5. Whether the court below was right in dismissing the appeal after holding thatEx.A2 is inadmissible in evidence?

6. Mr. Raguvaran Gopalan, learned counsel for the appellants vehemently contended that the lower appellate court, having rightly held that Ex.A2 is inadmissible in evidence as it is an unregistered and unstamped instrument, ought not have dismissed the appeal and in the absence of any division of properties under Ex.A2, as alleged by the plaintiff/respondent, the plaintiff/respondent cannot claim any absolute title to the suit properties and therefore, the lower appellate court ought to have allowed the appeal and dismissed the suit. He further submitted

that the Commissioner''s report would also probablises that the suit property was not in the enjoyment of the plaintiff/respondent and therefore, the respondent, having failed to prove that there was a partition among the brothers under which his vendors were allotted the suit properties, is not entitled to the decree prayed for. He also relied upon the judgments in Lakshmipathy, A.C. v. A.M. Chakrapani Reddiar (2001 (1) CTC 112) and Rangammal v. Kuppuswami (2011 5 MLJ 903 SC) in support of his contention that Ex.A2 is inadmissible in evidence and the burden of proof is on the plaintiff and when the plaintiff failed to prove his case, he is not entitled to declaration.

7. On the other hand, Mr. P.M. Duraisamy, learned counsel for the respondent submitted that Ex.A2 was admitted in evidence by the Trial Court without any protestor objection and when the document was admitted without any objection, the same cannot be challenged in second appeal. He further submitted that even assuming that Ex.A2 requires registration, the same can be received in evidence for collateral purpose u/s 49 of the Registration Act and though u/s 35 of the Stamp Act, a document which is not duly stamped cannot be received in evidence, once the document was received in evidence, u/s 36 of the Stamp Act, no objection regarding the admissibility of the document can be raised at a later point of time and therefore, the objections regarding the admissibility of Ex.A2 cannot be sustained. He further submitted that Ex.A2 does not require registration or does not require stamp duty as it only recorded the transaction regarding partition that took place earlier in the presence of panchayatdars and therefore, no right accrued under that document and it was only a record of the past transaction and such document does not require registration.

8. Mr. Raguvaran Gopalan, learned counsel for the appellants submitted that as per the judgment reported in 2001 (1) CTC 112 cited supra, the Honourable Division Bench of this court laid down the guidelines and also gave examples when the recitals in the family arrangement will require registration and a reading of Ex.A2 would prove that it was reduced into writing immediately after the decision of the panchayat and the partition was evidenced only through the document Ex.A2 and Ex.A2 was executed for the purpose of proof of partition and therefore, it requires registration.

9. Therefore, we will have to see whether Ex.A2 is admissible in evidence or is inadmissible in evidence as held by the lower appellate court. A reading of the recitals in Ex.A2 would make it clear that there was a partition of the properties in the presence of panachayatdars and as per the decision of the panchayatdars, the parties have taken their share in the properties. It was further stated that the total extent of 32 cents is to be divided into four portions and the first portion adjoining the road on the western side shall be taken by Maran and the second portion east of first portion was taken by Ramasamy son of Chellan and the third portion further east of the second portion was taken by Munian and the last portion of eastern

portion was taken by Shanmugam. Therefore, a reading of the recitals in Ex.A2 would make it clear that the parties divided the properties as per the decision of the panchayatdars and they only recorded the decision, how the division was effected as per the decision of the panchayatdars. In such circumstances, we will have to see the law laid down in the decision reported in 2001 (1) CTC 112 wherein this Honourable Court, after quoting various judgments of the Supreme Court, laid down the legal position as follows:

To sum up the legal position

(I) A family arrangement can be made orally.

(II) If document, arises. made no orally, question there being of registration no

(III) If the family arrangement is reduced to writing and it purports to create, declare, assign, limit or extinguish any right, title or interest of any immovable property, it must be properly stamped and duly registered asper the Indian Stamp Act and Indian Registration Act.

(IV) Whether the terms have been reduced to the form of a document is a question of fact in each case to be determined upon a consideration of the nature of phraseology of the writing and the circumstances in which and the purpose with which it was written.

(V) However, a document in the nature of a Memorandum, evidencing a family arrangement already entered into and had been prepared as a record of what had been agreed upon, in order that there are no hazy notions in future, it need not be stamped or registered.

(VI) Only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess.

(VII) If the family arrangement is stamped but not registered, it can be looked into for collateral purposes.

(VIII) Whether the purpose is a collateral purpose, is a question of fact depends upon facts and circumstances of each case. A person cannot claim a right or title to a property under the said document, which is being looked into only for collateral purposes.

(IX) A family arrangement which is not stamped and not registered cannot be looked into for any purpose in view of the specific bar in Section 35 of the Indian Stamp Act.

10. As per clause (V), a document in the nature of memorandum evidencing the family arrangement already entered into and had been prepared as a record of

what had been agreed upon, need not be stamped or registered. As per clause VI, when the parties reduced the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and where the arrangement had been brought about by the document, then the document requires registration.

11. The learned counsel for the appellants Mr. Raguvaran Gopalan relied upon clause VI and further brought to my notice the illustrations given by the learned Judges in para 32 and contended that in this case, thedocument was reduced into writing with the purpose of usingthat writing as proof of what they had arranged andtherefore, it requires registration.

12. As per para 32 in the above said judgment, certain examples are given to indicate the cases of family arrangement reduced into writing with the purpose of using the same as proof of what was arranged and they are as follows:

a) Document setting out all the terms and conditions of the family settlement in extenso.

b) Document mentioning that till then(execution of the said document) parties have been members of the joint Hindu Family.

c) Where the document was written immediately after the understanding between the parties with regard to the arrangement.

d) Document containing Clause to the effect that the parties are under the document release their rights under the document.

e) The settled legal position is that a document must be read as a whole and as to the nature of transaction under the document, it cannot be decided by merely seeing the nomenlature.

f) mere usage of past tense in the document should not be taken as indicative of a prior arrangement. AIR 1998 SC 881

13. According to me, a reading of clauses (V) and (VI)in para 42 in the above judgment would clearly make the distinction in respect of the documents which require registration and which do not require registration. As per clause (VI), when the family arrangement was reduced into writing with the purpose of using that writing as proof of what they had arranged and where the arrangement is brought about by the document as stated, then that document requires registration. Under clause (V), when the document only recorded the family arrangement already entered into, and was prepared as a record of what had been agreed upon, such document shall not require registration or stamp duty.

14. In this case, as stated supra, there was a family arrangement in the presence of the panchayatdars and parties agreed to divide the properties and also agreed to take specific portion of property as per the panchayat decision and that was reduced into writing under Ex.A2. In this case, the defendants/appellants contended

that there was a partition in the year 2000 and in that partition, the suit properties were allotted to the share of Shanmugam and Munian. Whereas, the case of the respondent/plaintiff was that under the earlier partition, the suit properties were allotted to the share of Munian and Chellappan. Therefore, the defendants/appellants also admitted that there was a partition in the presence of panchayatdars and the properties were divided and also each party was given specific portion of property under the partition and the same was reduced into writing. Hence, having regard to the admission of the appellants that there was a partition in the year 2000 and having regard to the recitals in Ex.A2,it can be safely concluded that no partition was effected under Ex.A2 and the parties had already divided the properties as per the decision of the panchayatdars andEx.A2 only recorded the division of properties by the panchayatdars which took place earlier and therefore, it will not come under the ambit of clause VI as stated in Para 42 and it will come only under clause V and hence, it does not require registration or stamp duty.

15. Further, the Honourable Supreme Court in the judgment in R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, , relying upon Order 13 Rule 4 of the Code of Civil Procedure, held as follows:

Order 13 Rule 4 of the CPC provides for every document admitted in evidence in the suit being endorsed by or on behalf of the Court, which endorsement signed or initialled by the Judge amounts to admission of the document in evidence. An objection to the admissibility of the document should be raised before such endorsement is made and the Court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend the document being endorsed as admitted or not admitted in evidence. In the latter case, the document may be returned by the Court to the person from whose custody it was produced.

16. This was relied upon by the learned Judge of this court in Sarguru v. Krishnasamy (2010 (2) MWN (Civil) 246) and the learned Judge held that once the document has been marked without any objection, it cannot be questioned at a later point of time. Further, as per the judgment of the Honourable Supreme Court in Javer Chand and Others Vs. Pukhraj Surana, , the Honourable Supreme Court has held as follows:

That Section is categorical in its terms that when a document has once been admitted in evidence, such admission cannot be called in question at any stage of the Suit or the proceeding on the ground that the instrument had not been duly stamped. The only exception recognized by the section is the class of cases contemplated by Section 61, which is not material to the present controversy. Section 36 does not admit of other exceptions. Where a question as to the admissibility of a document is raised on the ground that it has not been stamped or has not been properly stamped, it has to be decided then and there when the

document is tendered in evidence. Once the Court, rightly or wrongly, decides to admit the document in evidence, so far as the parties are concerned, the matter is closed. Section 35 is in the nature of a penal provision and has far-reaching effects. Parties to a litigation, where such a controversy is raised, have to be circumspect and the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the Court. The Court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case.

17. Further, u/s 36 of the Stamp Act, once an instrument which is not duly stamped is admitted in evidence, no objection can be raised at a later point of time. In this case, when Ex.A2 was marked, there was no objection raised by the appellants and therefore, they cannot object to the admissibility of the document in the second appeal stage.

18. Further, in Ex.B1, the sale deed executed by Munian in favour of Sundari, the boundary recitals are contrary to the allotment of properties by the brothers asper the case of the defendant and according to the appellants, the property adjoining the road on the easternside was allotted to Shanmugam and the next eastern property was allotted to Munian. But, in Ex.B1, the property adjacent to the road on the eastern side is said to be the property of Angayee, the wife of Shanmugam and when Shanmugam is alive, how his wife Angayee was shown as owner was not explained. Further, the commissioner''s report also did not probablise the case of the appellants and according to the appellants, they have put up construction and they are paying house tax in respect of that property and the commissioner has only found foundation in the suit property in the eastern portion and there is a small hut in a portion adjoining the road and considering the evidence of the parties and the commissioner''s report, the lower appellate court held that the property was conveyed to the respondent/plaintiff by the vendors and the appellants have no right over the same. Therefore, according to me, the lower appellate court erred in holding that Ex.A2 is inadmissible in evidence and ought to have held that it is admissible in evidence and ought to have decreed the suit.

19. Further, the respondent/plaintiff has proved that he is the owner of the property by virtue of sale deed in his favour Ex.A1 and the property was trespassed by the appellants and therefore, he filed the suit for recovery of possession by amending the plaint and the respondent/plaintiff has discharged the burden that he is the owner of the property and the appellants who claimed oral partition did not prove the same and therefore, substantial questions of law 1 to 4 are answered against the appellants.

20. Further, the lower appellate court ought to have held that Ex.A2 is admissible in evidence and even thoughEx.A2 was held inadmissible in evidence by the lower appellate court, having regard to the other circumstances, the lower appellate court rightly dismissed the appeal and hence, the fifth substantial question of law is also

answered against the appellants.

21. In the result, the second appeal is dismissed and the judgment and decree of the courts below are confirmed. No costs. The connected miscellaneous petitions are also dismissed.