



S.A.No.981 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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DATED: 21.03.2024

Coram

THE HON'BLE MR JUSTICE V. LAKSHMINARAYANAN

Second Appeal No.981 of 2013

1.K.Ayyasamy

2.K.Arukutti @ Aruchamy

... Appellant/Defendants

-Versus-

1.R.Karuppusamy

2.R.Ponnammal

3.R.Chinnammal

4.Dhulasimmal

5.Karupapathal(Died)

6.R.Ramathal

7.C.Murugathal

8.C.Palaniammal

9.Sundaramoorthy

10.Parameshwari

11.Velumani

... Respondents/Plaintiffs

(R9 to R11 are brought on record as legal heirs of the deceased R5 vide order dated 11.01.2024 made in CMP.Nos.22659, 22666 & 22670 of 2023)

Appeal filed under Section 100 of C.P.C. against the judgement and decree dated 31.10.2012 passed in A.S.No.58 of 2012 on the file of I Additional District Judge at Coimbatore, confirming the Judgment and Decree dated 12.12.2011 passed in O.S.No.748 of 2007 on the file of the I Additional Subordinate Judge at Coimbatore.



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For Appellants : Mr.R.Bharathkumar
For Respondents : Mr.S.Mukund, Senior Counsel
1 to 4 and 6 to 8 Assisted by,
Ms.T.R.Gayathri

JUDGEMENT

This second appeal arises out of the judgment and decree of the court of I Additional District Judge at Coimbatore in A.S.No.58 of 2012 dated 31.10.2012 in confirming the judgment and decree of the court of First Additional Subordinate Judge at Coimbatore in O.S.No.748 of 2007 dated 12.12.2011.

2. For the sake of convenience, the parties will be referred to as per their ranks in the suit.

3. The appellants before me are the defendants in the suit. The plaintiffs presented the suit seeking for preliminary decree for partition and allotment of half share of the suit schedule mentioned property to the plaintiffs and for consequential reliefs.



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4. The case of the plaintiffs is that the suit properties were originally joint family properties of Kuppanda Gounder. Kuppanda Gounder had borrowed money from Kunni Chettiar and therefore, executed a sale deed for the entire extent of 6 acres of land in favour of the said Kunni Chettiar. After the death of Kuppanda Gounder, the said Kunni Chettiar executed a sale deed for the suit schedule mentioned property in favour of wife of Kuppanda Gounder viz., Subbathal. Therefore, Subbathal became the absolute owner of the suit schedule mentioned property. Subbathal had four sons namely, Ramasamy Gounder, Chinnappa Gounder, Ayyasamy Gounder and Aruchamy Gounder. They were in possession and enjoyment of the property. The plaintiffs 1 to 5 are the grandchildren of Ramasamy Gounder and the plaintiffs 7 and 8 are the children of late Chinnappa Gounder. According to them, Subbathal is no more and therefore, on her death, the property has to be divided and each of her sons will get 1/4th share in the suit property.

5. On service of summons, the second defendant entered appearance and filed a detailed written statement. The stand taken by the second defendant was adopted by the first defendant. They admitted the relationship between the parties. They also admitted to the fact that Subbathal purchased the property from Kunni Chettiar in the year 1949. They denied the fact that the suit



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property was not joint family property in the hands of Subbathal but a self-acquired property. They pleaded that Subbathal had executed two separate settlement deeds in favour of the defendants. As per the settlement deed, the second defendant claimed 1.75 acres and insofar as the first defendant is concerned, he claimed 1.26 acres. Both the settlement deeds according to them, were registered on 09.04.1999. They pleaded that pursuant to the settlement deeds, they have taken possession of the property and are in occupation of the same. They pleaded that they also mutated the revenue records and therefore, the plea of joint possession is false. According to them, Subbathal executed the settlement deeds in their favour on account of the fact that she had natural love and affection for the sons, who took care of her.

6. On the basis of the these pleadings, the trial court framed the following issues:

“1. Whether the plaintiffs are entitled to division of the suit property into two equal shares and allot one such share to them?

2. Whether the plaintiffs are in joint possession of the suit property?

3. To what other relief?”



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7. On the side of the plaintiffs, the first plaintiff was examined as PW1 and marked Ex.A1 and Ex.A2. On the side of the defendants, the defendants themselves were examined as DW1 and DW2 and marked Ex.B1 to Ex.B9.

8. On analysis of the oral and documentary evidence, the learned trial judge came to the conclusion that the plaintiffs have proved their case and therefore, decreed the suit.

9. Aggrieved by the preliminary decree, the defendants took it on appeal before the learned I Additional District Judge at Coimbatore. This appeal was taken on file as A.S.No.58 of 2012. In and by way of a Judgment dated 31.10.2012, the learned I Additional District Judge confirmed the decree of the trial court. Against which the present Second Appeal.

10. This Court was pleased to admit the second appeal on 24.09.2013 on the following substantial questions of law:

“1. Whether the courts below are justified in decreeing the suit for partition in the absence of a prayer for setting aside Ex.B2 and Ex.B7 settlement deeds executed in favour of the defendants?”



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2. Whether the courts below are justified in holding that the suit property is joint family property of the plaintiffs and the defendants in the absence of any evidence regarding ancestral nucleus or the existence of joint family?”

11. I heard Mr.R.Bharath Kumar for the appellants and Mr.S.Mukund, learned Senior Counsel assisted by Ms.T.R.Gayathri for the respondents 1 to 4 and 6 to 8.

12. Mr.R.Bharathkumar would contend that by virtue of the fact that Kuppanda Gounder had sold the property to Kunni Chettiar and the same had been purchased by Subbathal on 15.06.1949, the property became her absolute property and therefore, the plea of plaintiffs that it is an ancestral property is not acceptable. He would then contend that the plaintiffs ought to have been non-suited since they have not sought for setting aside the settlement deeds under Ex.B2 and Ex.B7 which have been executed in favour of the defendants.

13. Mr.S.Mukund would submit that it does not matter whether the property is self-acquired or joint family property of Kuppanda Gounder, when

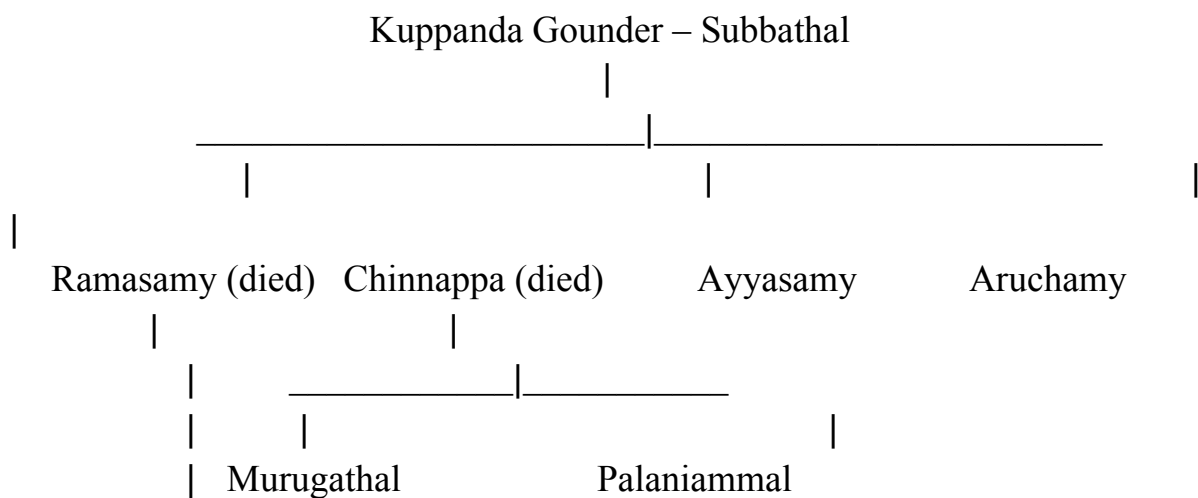


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the succession opened on the death of Subbathal on 15.12.2000, all the four sons would be entitled to a share by virtue of the Hindu Succession Act. He adds as per Section 123 of the Transfer of Property Act, a settlement deed should be attested and as per Section 68 of the Indian Evidence Act, it requires the party to prove the same by examination of the attesting witnesses. In this case, as they have not done so, the settlement deeds cannot be accepted to be proved. He would further point out that being a concurrent finding of the fact, this Court should not interfere with the judgment of the courts below.

14. I have carefully considered the arguments on either side.

15. Though the defendants had disputed the genealogy that had been given, I am able to discern from the arguments that the following is the genealogy:





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16. The plaintiffs 1 to 6 are the wife and grandchildren of Ramasamy Gounder, the first son of Kuppanda Gounder and Subbathal. The plaintiffs 7 and 8 are the children of Chinnappa Gounder, the second son of Kuppanda Gounder and Subbathal. Therefore, the relationship between the parties are admitted.

17. From Ex.A1, I am able to see that Kunni Chettiar, the purchaser of the property from Kuppanda Gounder, had alienated the property in favour of Subbathal. Once the property had gone out of the family of Kuppanda Gounder, it lost its joint family status. Therefore, I would concur with the findings of the first appellate judge that it cannot be held that the property is ancestral in character. Consequently, the second question of law that the property cannot be treated as joint family property is answered in favour of the appellants/defendants. However, the fact that this question of law is answered in



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favour of the appellants/defendants does not make a difference to the case as would be seen later.

18. It is the argument of Mr.R.Bharath Kumar that the plaintiffs have not denied the settlement deeds that had been projected by the defendants by way of a pleading.

19. Order VIII Rule 9 of the Code of Civil Procedure speaks about the pleadings that are filed after the plaint and the written statement are taken on record. It is not a matter of right for a party to file a pleading in the nature which is covered under Order VIII Rule 9. He has to seek the leave of the court to present such a pleading. Further, failure to file a reply statement to the written statement is not fatal to the case. It is the discretion of the plaintiff to file a reply statement and in case, such a reply statement is not filed disputing the contents of the written statement, it does not mean the plaintiff had admitted to the contents contained in the written statement. Therefore, his argument for failure to file a reply statement fatal to the plaintiffs is rejected.

20. If a party propounds a document before the court, the burden of proving the said document is on the said party. I am only reiterating the settled



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position of law. In this particular case, the settlement deeds under Ex.B2 and Ex.B7 had been projected by the defendants. Therefore, the burden of proving the settlement deeds was on the defendants 1 and 2. Though they projected the settlement deeds to defeat the claim of the plaintiffs, unfortunately they have not examined the attesting witnesses. A settlement deed by virtue of Evidence Act read with Transfer of Property Act is a document which requires attestation. Such a document should be proved before the Court of law by examining the attesting witness. Mere filing of the settlement deed does not satisfy the requirements of law.

21. Mr.R.Bharath Kumar would contend that as per Section 68 of the Indian Evidence Act, if a document is not specifically denied, then the defendant did not have the duty to examine the attesting witness. In this particular case, Mr.R.Bharath Kumar is correct that the plaintiffs have not spoken about the settlement deeds at all. However, the defendants during the cross examination had put the following question to the plaintiffs which has been denied by him. The relevant portion of the evidence is extracted hereunder:

“ என் பாட்டிக்கு முன்னர் தான் என் அப்பா இறந்துவிட்டார், அதனால் என் பாட்டியை அவர்கள் கவனித்ததால் தான் அன்பினாலும் பாசத்தாலும் பிரதிவாதிகளுக்கு சொத்தை தான் செட்டில்மெண்ட் எழுதிவைத்துள்ளார் என்றால்



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சரியல்ல,”

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22. This shows that the plaintiffs in the cross examination had denied the execution of the document. At least taking note of this denial, the defendants should have produced the attesting witness. Curiously enough, the defendants compounded their case by stating that their mother did not know to read or write and she did not have a knowledge of execution of settlement deed. This is clear from the cross examination of DW1 in the following terms:

“ பி2 பத்திரம் எழுதி வாங்கும் போது என் அம்மாவிற்கு வயது 70 இருக்கும். என் அம்மாவிற்கு எழுத படிக்கத் தெரியாது. பி2 பத்திரத்தை நானும் என் சகோதரரும் பத்திர அலுவலகத்திற்கு போய் எழுதி வாங்கி வந்தோம். என் அம்மாவிற்கு பி2 பத்திரத்தில் எழுதியுள்ளது தெரியுமா என்றால் அவர் படிக்கவில்லை அதனால் அவருக்கு எப்படி தெரிய முடியும் என சாட்சி பதில் கூறினார்.”

23. The extract of this evidence shows that the defendants accepted to the fact that their mother is illiterate and since she does not know how to read and write, she could not know the nature of the documents that were being executed by her.

24. Considering the advanced age of Subbathal when she executed the documents, the burden heavily lies on the defendants to substantiate the same.



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A settlement deed, like a Will, interferes with the natural course of succession.

Hence, it is the duty of a person who relies upon the said document to prove the same to the satisfaction of the court.

25. As stated above, the manner of proof is set forth in the Indian Evidence Act. Despite the fact that suspicion had been cast over the documents, the defendants on whom the burden lay unfortunately did not choose to cast away the burden by examining the attesting witnesses.

26. At this stage, Mr.R.Bharath Kumar would refer to the judgment of this court in *Muthusamy vs. S.Kaliammal and others*, (2017) 3 MLJ 100 and would submit that under similar circumstances, this Court had held that there is no necessity for a defendant to examine the attesting witness when it has not been specifically denied in the proof affidavit filed by the plaintiff.

27. I would have respectfully followed the judgement if not for the answers that the defendants obtained from the plaintiffs in the cross examination. Furthermore, the suspicious circumstances had been created by the statement of the defendants as set forth above. In *Muthusamy's case* referred *supra*, the learned Judge went through the evidence and came to the conclusion that there is nothing in the evidence to disbelieve the document.



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However, in the present case, as pointed out above, the denial of documents by the plaintiffs in the cross examination compounded by the statement made by DW1 in his cross examination throws suspicion that subbathal, who was an illiterate person executed the documents without knowing the contents thereon. In those circumstances, the aforesaid judgment does not come to the rescue of the defendants.

28. In the light of the above discussion, I am of the clear view that the appeal has to fail.

29. The answer of the first question of law is that the property is a self acquisition of the Subbhathal and the answer to the second question of law is as the defendants have not proved the settlement deeds, the question of setting aside the same does not arise. It is the duty of the defendants to prove the settlement deeds and they had failed to do the same.

30. Consequently, the second appeal fails and it is dismissed. The judgment and decree of the court of I Additional District Judge at Coimbatore in A.S.No.58 of 2012 dated 31.10.2012 in confirming the judgment and decree of the court of I Additional Subordinate Judge at Coimbatore in O.S.No.748 of 2007 dated 12.12.2011 stands confirmed.



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31. The learned I Additional Subordinate Judge at Coimbatore is directed to follow the verdict of the Supreme Court in ***Shub Karan Bubna v. Sita Saran Bubna, (2009) 9 SCC 689*** and not wait for the parties to file an application for the purpose of final decree. He shall issue notice to the parties to the suit and take up the matter for passing of the final decree. He shall appoint an Advocate Commissioner, who shall suggest the mode of division and the trial court is directed to pass orders within a period of nine months from the date of receipt of a copy of this Order. I am giving the aforesaid direction, since the parties have been litigating over the property for the past 17 years.

32. Considering the relationship between the appellants and the respondents, I am not inclined to impose costs.

21.03.2024

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Index : yes / no
Neutral Citation : yes / no
Speaking / Non Speaking Order



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To

- 1.The I Additional District Judge at Coimbatore,
- 2.The I Additional Subordinate Judge at Coimbatore.



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V.LAKSHMINARAYANAN, J.
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