

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.03.2015

CORAM:

THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

S.A.No.1161 of 1998

1.Poonjolai
2.Mani
3.Ravichandran

...Appellants/Defendants 1, 2,3

Vs.

1.Sadasivam
2.Annadurai
3.Amudha @ Chinnaponnu
4.Jegadambal
5.Thirumalai

...Respondents/Plaintiffs &
Defendants 4 to 6

R5 impleaded vide order dated
30.1.2015 made in CMP.238 of 2010)

Second Appeal is filed under Section 100 C.P.C against the judgment and decree dated 30.04.1998 made in A.S.No.107 of 1993 on the file of the Sub Court, Ariyalur reversing the judgment and decree dated 26.2.1993 made in O.S.No.179 of 1992 on the file of the Additional District Munsif, Ariyalur.

For appellants : Mr.M.V.Muralidharan

For respondents : Mr.C.Selvaraju, SC
for M/s.C.S.Associates (R1)
Mr.Sankaravadivel (R5)

सत्यमेव जयते
J U D G M E N T

The defendants 1 to 3 in the suit in O.S.179/1992, who are the respondents 1 to 3 in AS.107/93, are the appellants herein. The suit in O.S.179/1992 is filed by the first respondent/plaintiff for declaring his absolute ownership and for permanent injunction restraining the defendants from interfering with the plaintiff's peaceful possession and enjoyment of the property measuring 1.92 cents in S.No.57/2 Venkalam Village, Trichy District.

2.The plaintiff and the defendants are closely related to each other. The plaintiff's father Kandasamy was the brother of one Muthu, whose widow, sons and daughters are the defendants 1 to 6. The brothers Kandasamy and Muthu owned ancestral properties and the same were partitioned between them and the suit property was admittedly assigned in the name of Kandasamy by the Government during 1966 under Ex.B2 assignment deed. Thereafter, Kandasamy executed a settlement deed in respect of the suit property in favour of his brother Muthu in 1981. According to the plaintiff, the cost of the suit property was paid, out of the income derived from the joint family property belonging to Kandasamy and his son Sadasivam, who is the plaintiff herein and the property was, after assignment in favour of plaintiff's father, improved jointly by assignee and his son/plaintiff herein and the same has been jointly enjoyed by the assignee and his son by obtaining patta and by paying kist. It is the further case of the plaintiff in his plaint and in the reply statement that Ex.B1 settlement deed mentioned in the written statement was not executed by his father Kandasamy and the same was forged one and Kandasamy had no right to execute settlement in respect of joint family properties and the same was not acted upon and even after settlement deed, the property has been in possession and enjoyment by the plaintiff's father and the plaintiff. According to the contesting defendants 1 to 3, the suit property was during 1981 settled by the assignee in favour of his brother Muthu and the settlement deed was acted upon and after settlement, the settlee and his wife and children, who are the defendants, have been in possession and enjoyment of the property by obtaining updating patta and by paying kist etc.

3.The trial court has on the basis of the oral and documentary evidence adduced on both sides before the same, arrived at the conclusion that the suit property is the property assigned in favour of the plaintiff's father by recognising his possession and the same is his self acquired property and the same is not the property of the joint family consisting of the plaintiff's father Kandasamy and the plaintiff and Ex.B1 dated 29.7.1981 is true and valid settlement deed executed in favour of Muthu by Kandasamy in respect of the suit property and the defendants have been in possession and enjoyment of the same on the strength of Ex.B1 by paying kist etc. and the plaintiff is hence dis-entitled to get any relief. The trial court accordingly dismissed the suit. Aggrieved against the same, the plaintiff preferred AS.107/1993 before the Sub Court, Ariyalur. The lower appellate court set aside the judgment and decree of the trial court by reversing the finding of the trial court. The Lower appellate court has found that the suit property was assigned in favour of Kandasamy only for the benefit of joint family and the same was not the separate property of Kandasamy and the same was hence

property of the joint family consisting of his father and the plaintiff and thereafter succeeded by the plaintiff. The lower appellate court has also found that the settlement deed is not proved and the same is not acted upon and the property continue to stand in the name of Kandasamy in the revenue records even after the settlement deed and the property has been continuously in possession and enjoyment of the plaintiff and as the revenue records continuously stand in the name of the plaintiff, the defendants have no claim over the property in question. The lower appellate court has accordingly allowed the appeal and set aside the judgment and decree of the trial court. Hence, this second appeal by the contesting defendants 1 to 3 before this court.

4.The second appeal is admitted on the following substantial questions of law:

(a)Whether the learned Sub Judge is correct in neglecting Ex.B1 when the said instrument i.e, Ex.B1 dated 29.8.1981 in document no.86/81 is registered before the competent registering authority?

(b)Whether the learned Judge is correct in relying on Ex.A8 to Ex.A14 and Ex.A16 and Ex.A17 for decreeing the suit? and

(c)Whether the learned Sub Judge has committed an error in omitting to deal with Ex.B1 and the endorsement, when it is enumerated under Section 59 of the Evidence Act 1872?

5.Heard both sides and perused the records.

6.It is not in dispute that the property in question was originally assigned in the name of the plaintiff's father, that too after partition of the ancestral/joint family properties between the plaintiff's father and his brother Muthu, whose legal heirs are the contesting defendants 1 to 3 and other defendants 4 to 6. When the assignment was in the name of the plaintiff's father, the burden is upon the plaintiff to prove that it was assigned in the name of the plaintiff's father for the benefit of joint family consists of his father and himself and the same was enjoyed by them as joint family property. The plaintiff in the plaint did not admittedly raise any pleading to that effect. The case of the plaintiff in the plaint is that the schedule mentioned property was ancestral joint family property belonging to the plaintiff and his father and the same was in enjoyment of the father and thereafter in the plaintiff's enjoyment. The plea that it was assigned in the name of the plaintiff's father is pleaded only in the reply statement filed after

written statement and additional written statement filed on the side of the defendants. It is further pleaded in the reply statement that the same was in the occupation of his parents, who toiled together to make it cultivable and the income derived from the joint family property and the income of his wife and son to the tune of above Rs.10,000/- were utilised for the same and thereafter, the same was enjoyed as joint family property and the same is hence belonging to joint family consisting of the plaintiff's father and the plaintiff.

7. When that being the case of the plaintiff, the burden is on the plaintiff to substantiate the same. In this regard, the plaintiff examined himself and one Perumal as PW1 and PW2. As far as the plaintiff/PW1 is concerned, he was on the date of filing of the plaint during 1987, shown as aged about 30 years. If that is so, he must have been on the date of assignment during 1966 below 9 years and is not competent enough to speak about the person in whose occupation was the property and the nature and manner of their occupation. As a matter of fact, the plaintiff as PW1 has not deposed about the joint possession of the property with his parents and improvement of the same through joint exertion by the parents and himself from and out of the joint family income. Whereas, the plaintiff has come forward with the different case as if the property was purchased from and out of the joint family income and the same was in the occupation of his father and thereafter in his occupation and it is who improved the same by incurring expenditure. Thus, the plaintiff's evidence is of no help to prove about joint nature of the property. Similarly, the evidence of PW2 does also not advance the plaintiff's case. As such, in the absence of necessary pleadings and proof in support of the joint family nature of the property, the finding of the lower appellate court that it is for the benefit of the joint family is baseless and unfounded. The trial court having regard to the fact that the property was assigned in the name of the individual by the Government, rightly found that the same is the separate property of the plaintiff's father.

8. Next aspect to be considered herein is the genuineness and valid execution of Ex.B1 settlement deed by the plaintiff's father in favour of his brother by name Muthu. The defendants have examined the witnesses in Ex.B1 document by names Jambulingam and Viswanathan as DW2 and DW3, whose evidence do establish the voluntary execution of the same by the plaintiff's father in favour of his brother. The contesting defendants by examining those witnesses, have duly established the genuineness and valid execution of Ex.B1 settlement deed and the trial court having accepted their evidence upheld the validity of the same. Whereas, the lower appellate court without any legally sustainable reason, reversed such finding of the trial court. Though the plaintiff has denied the genuineness of the same and

attempted to put forth a plea that it was the outcome of an act of forgery, the same on the basis of the evidence of DW2 and DW3 is not liable to be rejected. As a matter of fact, the plaintiff as PW1 in the witness box, has almost given up the plea regarding forged nature of the document only assertion made by him is that his father would not have done it without informing him. In that event, there is absolutely no reason to doubt the genuineness and valid execution of Ex.B1 settlement deed in favour of his brother by the plaintiff's father.

9.As a matter of fact, the defendants have in their written statement specifically pleaded that the plaintiff's father has in token of acceptance of the gift, handed over the original assignment to his brother. The defendants have also produced Ex.B2 original assignment from their custody and Ex.B8 patta in respect of the property in question standing in the name of the plaintiff's father. Whereas, the plaintiff offered no explanation for the custody of the original document with the defendants, except making a vague statement in the witness box that it was lost during 1987. It is true that the defendants 4 to 6, who are the son and daughters of the settlee by name Muthu through his first wife, supported the plaintiff's case by denying execution of any settlement deed by the plaintiff's father in favour of their father. However, as the relationship between the defendants 1 to 3 on one hand and the defendants 4 to 6 on other hand is admittedly strained their evidence particularly in the light of Exs.B1 settlement deed, B2 assignment and B8 patta need not be attached any importance. Excluding their evidence, there is no valid ground is made and to doubt the genuineness and valid execution of Ex.B1.

10. It is true that there was no mutation of records from the name of the plaintiff's father after settlement deed in 1981 and the property continued to be in the name of the plaintiff's father Kandasamy. However, the defendants, after the death of settlee by name Muthu, applied for UDR patta and notice was also issued to the plaintiff for enquiry and as the plaintiff failed to appear for enquiry, the Tahsildar under Ex.B9 dated 30.11.1986 transferred the patta in the name of the defendants 1 to 3. In pursuance of the same, chitta was also transferred in the name of the first defendant under Ex.B10. The same was again appeared to be re-transferred in the name of the plaintiff during the pendency of the suit as evident from Ex.A16. There were also receipts produced on both sides towards payment of tax for the suit property. The trial court, having regard to the availability of revenue records in the name of both the plaintiff and the contesting defendants during the relevant of point of time in respect of the property, was inclined to ignore the same and proceeded to decide the issue on the basis of the title deed. Whereas, the lower appellate court merely on the basis of adangal

extract standing in the name of the original owner Kandasamy, arrived at an erroneous conclusion that the same continues to be in possession and enjoyment of the plaintiff. As a matter of fact, the plaintiff's name is not at all entered in the adangal extract produced herein to prove his possession and enjoyment of the suit property. The plaintiff himself has in the course of his cross examination admitted that he raised corn crop and the same was harvested by the defendants. In short, the plaintiff failed to prove his possession and enjoyment of the suit property, whereas the lower appellate court without duly appreciating the nature of the claim made by the plaintiff in the plaint and nature of the proof available before the same in for and against the claim of the parties, particularly in support of the defendants' case upheld the plaintiff's claim, merely on the basis of the revenue records and negatived the defendants' claim, which are based on valid title deed and such finding is but perverse leading to an erroneous judgment and the same warrants serious interference by this court.

11. In the result, the second appeal is allowed by setting aside the judgment and decree of the lower appellate court and by restoring the judgment and decree of the trial court. Considering the relationship between the parties, there is no order as to costs.

Sd/-
Deputy Registrar (J)

//True Copy//

Sub Assistant Registrar

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To

1. The Sub Court,
Ariyalur.

2. The Additional District Munsif,
Ariyalur.

1 CC to Mr. M. V. Muralidharan, Advocate SR.No. 11594
1 CC to the Government Pleader,

Copy to The Section Officer, V.R. Section,
High Court, Madras.

S.A.No.1161 of 1998

LRS (CO)
PSI (20.07.2015)