

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 18.12.2014

Delivered on : 06.01.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.No.1463 of 2007

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M.P.No.1 of 2007

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M.P. Nos.1 and 2 of 2008

Lokanathan

...Appellant/Defendant

-Vs-

Narayanaswamy

...Respondent/Plaintiff

Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree passed by the Principal Subordinate Judge, Virudhachalam in A.S.No.86 of 2005 dated 18.07.2006 confirming the judgment and decree of District Munsif-cum-Judicial Magistrate, Tittakkudi in O.S.No.75 of 2004 dated 26.04.2005.

For Appellant : Mr.V.Anand

For Respondent : Mr.V.Ayyadurai

JUDGMENT

The defendant in the original suit is the appellant in the second appeal. The appellant and the respondent are the sons of Late Velayudham. The respondent herein filed the suit O.S.No.75 of 2004 on the file of the trial Court for partition and separate possession of his half share in the suit properties and for mesne profits. The learned trial Judge granted a preliminary decree for partition by judgment and decree dated 26.04.2005. The appellant herein filed an appeal in A.S.No.86 of 2005 on the file of the lower appellate Court. The lower appellate Court by its judgment and decree dated 18.07.2007 confirming the decree of the trial Court, dismissed the appeal. As against the said decree of the lower appellate Court dated 18.07.2007, the present second appeal has been filed.

2. Velayudham, the father of the appellant and respondent, claimed to be the absolute owner of the properties that are the subject matters of the suit from which the present second appeal has arisen and also all other properties. Contending that all those properties were his self-acquisitions and thus they were his absolute properties, Velayudham filed a suit in O.S.No.104 of 1984 on the file of the Sub-Court, Virudhachalam for a declaration to the said effect and for a permanent injunction against his sons namely, the appellant and the respondent herein. The said suit ended against Velayudham and it was dismissed by the Sub-Court, Virudhachalam by a decree dated 13.01.1988, a certified copy of which is Ex.A1. Challenging the said decree dismissing the suit O.S.No.104 of 1984 filed by him for declaration and injunction, Velayudham filed an appeal in A.S.No.50 of 1988 on the file of the District Court, Cuddalore. In the said appeal, a compromise was effected and a compromise decree dated 03.02.1989 came to be passed based on a compromise memo signed by the parties to the said case containing the following clauses:

- 1) a decree declaring Velayudham to be the absolute owner of Item 1 of 'A' Schedule and item 4 of 'B' Schedule as per the schedules provided in the plaint in the said case and a consequential permanent injunction not to disturb his peaceful possession and enjoyment of the same was granted;
- 2) 'C' schedule property was in possession of the appellant herein and it would belong to him absolutely.
- 3) The sons of Velayudham viz., Lokanathan and Narayanaswamy shall jointly own Items 2 to 5 of the plaint 'A' schedule and Items 1 to 3 and 5 and 6 of 'B' schedule subject to a life interest of Velayudham in respect of a portion measuring 0.31 acres out of the property described as 6th item in the 'B' schedule in the plaint in the said suit (covered by a registered document dated 14.03.1920) without any power of alienation.

A certified copy of the said decree has been marked as Ex.A2.

3. According to the respondent herein/plaintiff in the original suit concerned in this second appeal, those two items of properties in respect of which Velayudham was granted declaration and injunction, on the basis of the compromise under the compromise decree dated 13.01.1988, Velayudham and his wife Valliammal executed a registered gift settlement deed on 09.10.1997 in favour of the son and daughter of the respondent herein/plaintiff. The original registered settlement deed is Ex.A3. The above said properties settled in favour of the son and daughter of the respondent/plaintiff are not the subject matters of the present suit O.S.No.75 of 2004. The appellant/defendant also does not dispute the title of the son and daughter of the respondent/plaintiff in the present suit, in respect of those two

items of properties which figured as Item No.1 in "A" schedule and Item No.4 in "B" schedule of the plaint in the previous suit, namely O.S.No.104 of 1984. On the other hand, controversy has arisen in respect of the remaining properties in respect of which the appellant herein/defendant and the respondent herein/plaintiff were held to be joint owners. The dispute has arisen even in respect of the property over which late Velayudham had been granted life interest as per the compromise decree dated 03.02.1989. The dispute arose pursuant to the claim of the appellant/defendant that he became the absolute owner of the present suit properties by virtue of a registered settlement deed dated 08.05.1998 executed by Velayudham and his wife Valliammal in favour of the appellant herein. The said settlement deed has been produced as Ex.B3 and a certified copy of the same has been produced by the respondent / plaintiff as Ex.A4. The case of the respondent/plaintiff is that the above said settlement deed dated 08.05.1998 marked as Ex.B3 is not a valid document and the same is not binding on the respondent/plaintiff in respect of his half share in the suit properties. Based on such plea, the respondent /plaintiff filed the original suit No.75 of 2004 praying for the relief of partition and separate possession of his share and also for mesne profits.

4. The suit was resisted by the appellant/defendant contending that the compromise decree passed in A.S.No.50 of 1988 (arising from O.S.No.104 of 1984) was not acted upon; that even otherwise in view of the compromise decree, the present suit filed for giving effect to the terms of the compromise decree without seeking execution of the compromise decree was not maintainable and that the suit filed several years after the passing of the compromise decree was hopelessly barred by limitation.

5. The trial Court, after framing necessary issues, conducted a trial in which one witness was examined as PW1 and four documents were marked as Exs.A1 to A4 on the side of the respondent/plaintiff, whereas two witnesses were examined as Dws 1 and 2 and seven documents were marked as Exs.B1 to B7 on the side of the appellant herein/defendant.

6. At the end of trial, upon considering the pleadings and evidence, the trial Court rejected the defence plea in all respects, accepted the case of the respondent/plaintiff and granted a preliminary decree for partition directing division of the suit properties into two equal shares and allotment of one such share to the respondent/plaintiff. So far as the prayer for mesne profits is concerned, the learned trial Judge relegated the same to be decided in a separate proceeding under Order XX Rule 12 CPC. As against the preliminary decree, the appellant/defendant filed A.S.No.86 of 2005 on the file of the lower appellate Judge / Principal Subordinate Judge, Virudhachalam. The learned lower appellate Judge, upon hearing the appeal, dismissed the appeal by judgment and decree dated 18.07.2006 confirming the preliminary decree passed by the trial Court. As against the said decree of

the lower appellate Court, the present second appeal has been filed on various grounds set out in the memorandum of grounds of second appeal.

7. At the time of admission of the second appeal, the following questions were identified and formulated as Substantial questions of law involved in the second appeal:

- i) Whether the Courts below are correct in law in passing a decree against the letter and spirit of Article 101 of the Limitation Act of 1963?
- ii) Whether the Courts below are correct in law in ignoring the principle that a compromise decree is akin to a contract and performance or non-performance of rights and obligations would inhere or extinguish the rights created thereunder?

8. The arguments advanced by Mr.V.Anand, learned counsel for the appellant and by Mr.V.Ayyadurai, learned counsel for the respondent were heard. The judgments of the Courts below and the materials available on record were also perused.

9. The appellant and the respondent are brothers and they are the sons of Late Velayudham. The suit properties and other properties were claimed by the said Velayudham to be his absolute properties. As his claim was resisted by his sons, namely the appellant and the respondent herein, the said Velayudham filed a suit in O.S.No.104 of 1984 on the file of the Sub-Court, Virudhachalam for a declaration that he was the absolute owner of all those properties and also for a permanent injunction against his sons, namely the appellant and the respondent herein and others restraining them from in any way interfering with his peaceful possession and enjoyment of those properties. The judgment of the said suit went against Velayudham and the suit came to be dismissed by a judgment dated 13.01.1988, whereupon Velayudham preferred an appeal before District Court, Cuddalore in A.S.No.50 of 1988. Pending disposal of the appeal, the father and sons effected a compromise and a compromise decree came to be passed on 03.02.1989. As per the compromise decree, Velayudham was recognized and declared to be the absolute owner of two items of properties. The said two items of properties are not the subject matters of the present case. Excepting those two items of properties which were described as Item 1 in "A" Schedule and Item 4 in "B" schedule in the plaint in the former suit, namely O.S.No.104 of 1984 filed by Velayudham, the appellant and the respondent herein were declared to be jointly entitled to all other properties found in the schedules to the plaint in the previous suit. They had been described as Items 2 to 5 of "A" Schedule and Items 1 to 3, 5 and 6 of "B" schedule of the plaint in the previous suit O.S.No.104 of 1984. Out of those items regarding which the appellant and the respondent herein were declared to be the joint owners, 31 cents forming a part of the property shown as Item No.6 of "B" schedule in the plaint in the former suit, was made subject to a life

interest in favour of Velayudham without any power of alienation. In the said property, the appellant and the respondent herein had got equal rights vested in them, subject to the enjoyment of the said property by their father velayudham till his life time.

10. So far as the title to the properties is concerned, it is a closed issue and it has been finally decided by virtue of the compromise decree dated 03.02.1989 made in A.S.No.50 of 1988. No one filed any suit or other proceedings to set aside the said compromise decree or to declare the said compromise decree to be null and void on the ground of fraud or any other vitiating factor. Admittedly, the said compromise decree came to be passed based on the settlement voluntarily arrived at between Velayudham and his sons (the appellant and the respondent herein). However, the relationship between the appellant and respondent got strained when the father Velayudham and his wife Valliammal executed a gift settlement in favour of the son and daughter of respondent herein/plaintiff in respect of those two items of properties which were declared to be Velayudham's absolute properties under the compromise decree dated 03.02.1989 made in A.S.No.50 of 1988, a certified copy of which has been produced as Ex.A2. The registered settlement deed dated 09.10.1997 executed in favour of the son and daughter of the respondent/plaintiff by Velayudham and his wife Valliammal has been produced and marked as Ex.A3. The appellant/defendant does not dispute the validity of the transfer of title made in respect of those two items of properties in favour of the son and daughter of the respondent/plaintiff. On the other hand he got a settlement deed executed by Velayudham in his favour under Ex.B3 dated 08.05.1998 in respect of all other properties held to be the joint properties of the appellant and respondent herein under Ex.A2 compromise decree. The appellant herein/defendant would contend that though a compromise decree came to be passed on 03.02.1989 in A.S.No.50 of 1988, declaring two items of property alone as the absolute properties of Velayudham and all other items of properties to be the joint properties of the appellant and the respondent herein subject to a life interest for Velayudham in respect of a portion of one of the items alone, such a compromise decree was not given effect to and it was not acted upon. According to the contention of the appellant/defendant, all the properties were the self-acquisitions of Velayudham and even after the compromise decree, Velayudham continued to treat those properties as his absolute properties and he alone was in possession and enjoyment of all those properties. It is his further contention that by virtue of a settlement deed dated 08.05.1998 executed by Velayudham and his wife Valliammal in favour of the appellant/defendant in respect of all other properties excepting the two which were settled on the sons of respondent /plaintiff under Ex.A3, the appellant/defendant became entitled to all the suit properties and that the settlement made in favour of the appellant / defendant would not be successfully challenged by the respondent/plaintiff. The above said contention of the appellant/defendant was made based on his plea that there was a

family arrangement in which two items of properties alone were agreed to be settled towards the share of respondent/plaintiff; that the same was done by executing Ex.A3 settlement deed in favour of the son and daughter of the respondent/plaintiff; that the remaining properties continued to be the absolute properties of Velayudham and he and his wife, by a valid deed of settlement, gifted the same in favour of the appellant /defendant and that thus, the appellant/defendant has become the absolute owner of the properties, which are the subject matter of the present suit.

11. In the trial, the respondent herein/plaintiff appeared as the sole witness on his side (PW1) and deposed in confirmation of the validity and binding nature of the compromise decree and to the effect that the compromise decree dated 03.02.1989 made in A.S.No.50 of 1988 was also acted upon. Ex.A2 is the certified copy of the compromise decree. Exs.A3 is the original settlement deed executed by Velayudham and his wife in favour of the son and daughter of respondent/plaintiff on 09.10.1997. A certified copy of the settlement deed executed by Velayudham and his wife in favour of the sons of respondent/plaintiff has been produced the appellant /defendant as Ex.B2. Those two documents were produced to show that Ex.A2 compromise decree was binding on them and they did act upon the same.

12. Admittedly, the compromise decree in A.S.No.50 of 1988 on the file of the District Court, Cuddalore came to be passed on 03.02.1989. As per the compromise decree, the properties which were settled under Ex.A3 dated 09.07.1997 in favour of the sons of the respondent/plaintiff were declared to be the absolute properties of Velayudham. However, while executing the gift settlement deed in favour of the sons of respondent/plaintiff, the wife of Velayudham also joined with him in the execution of the same. The compromise decree was not referred to as one of the sources from which Velayudham's title to the said properties came to be derived or confirmed. Without making any reference to the compromise decree and simply referring to the sale deed dated 07.08.1978 under which the said properties were purchased by Velayudham, the settlement deed under Ex.A3 came to be executed in favour of the sons of the respondent Narayanaswamy, who acted as guardian for his sons, as they were minors at that point of time. The appellant/defendant has not challenged the gift made by Velayudham under Ex.A3. The same is also not an issue in the present suit from which the second appeal has arisen.

13. Without referring to the source from which either Velayudham or his wife got title to the properties gifted therein (the subject matter of the present suit), Ex.B3 settlement deed dated 08.05.1998 came to be executed simply narrating that the settlors therein were the owners of the said properties and were in possession and enjoyment of the same. A comparison of Ex.A3 and B3 will make it clear that because of the settlement of the properties, which were declared to be the absolute properties of

Velayudham in the compromise decree, in favour of the sons of respondent herein, the appellant herein/defendant made his parents to execute Ex.B3 settlement deed in his favour, without reciting the source of acquisition of those properties by the settlors under the said document (Ex.B3). The fact that the chitta and adangal continued to be in the name of Velayudham as evidenced by Exs.B4 to B7 shall not be enough to substantiate the case of the appellant/defendant that the compromise decree is not binding on the parties to the same or that the compromise decree was not acted upon.

14. It is not the case of the appellant/defendant that subsequent to the passing of the compromise decree under Ex.A2, either Velayudham or the appellant/defendant set up adverse possession against the respondent/plaintiff in respect of the present suit properties and perfected title by adverse possession or ouster. On the other hand, as per the evidence of PW1, Velayudham died in October 1998. The said evidence of Narayanaswamy as PW1, has not been disputed and has not been proved to be wrong. On the other hand, the parties do admit that their father Velayudham died in the year 1998. Admittedly, the compromise decree in A.S.No.50 of 1988 was passed on 03.02.1989. After a lapse of about 9 years from the date of compromise decree, Velayudham died. During the life time of Velayudham, he would not have perfected title by adverse possession in respect of any of the properties recognized to be the joint properties of the appellant and the respondent herein. A few months prior to his death, Velayudham, along with his wife chose to execute Ex.B3 settlement deed in favour of the appellant herein/defendant. About 3½ years after the execution of Ex.B3 settlement deed, the respondent/plaintiff has filed the present suit for partition and separate possession and also for mesne profits.

15. It is pertinent to note that the respondent/plaintiff does not claim any title derived from his father Velayudham in respect of the suit properties. On the other hand he claims title in his own right as recognized by the compromise decree dated 03.02.1989. Therefore, there is no necessity for him to seek a declaration that the settlement deed executed in favour of the appellant/defendant under Ex.B3 is null and void or to seek a decree setting aside the settlement deed. He has filed the suit for partition and separate possession on his own right. Though the suit properties were declared to be the joint properties of the appellant and the respondent herein by virtue of the compromise decree, a certified copy of which has been marked as Ex.A2 that part of the decree is executable at the instance of either the appellant or the respondent herein, since the same does not direct division of their respective shares. A simple finding that both the appellant and the respondent herein are joint owners of the properties, which are the subject matter of the present suit, came to be made in the compromise decree and the only executable part of the decree is in respect of two items of properties, which

declaration and injunction were granted in favour of Velayudham. Those two items of properties were also later on settled on the son and daughter of the respondent herein under Ex.A3. So far as the remaining properties, namely the present suit properties, are concerned, the title of the respondent/plaintiff came to be disputed only on 08.05.1998 when Ex.B3 settlement deed came to be executed in favour of the appellant/defendant. From the said date alone it can be said that the title of the respondent/plaintiff was sought to be disputed and the possession by Velayudham followed by the possession of the appellant herein would amount to a possession adverse to the respondent/plaintiff. To defeat the valid title of the respondent/plaintiff, such possession should have been open, uninterrupted and continuous over the statutory period. The statutory period of limitation in this regard is 12 years from the date on which the possession of the other party became adverse to the plaintiff as per Article 110 of the Limitation Act.

16. In the case on hand, the possession of Velayudham and the possession of the appellant/defendant could be construed to have become adverse to the respondent/plaintiff only from 08.05.1998, the date on which Ex.B3 was executed. The relevant articles of the Limitation Act, 1963 are Articles 65, 106 and 110. Article 65 deals with a suit for possession of immovable property or any interest thereon based on title. The limitation is 12 years, which shall start from the date on which the possession of the defendant becomes adverse to the respondent/plaintiff. It is the case of the respondent/plaintiff in this case that the properties which were held to be joint properties of respondent/plaintiff and appellant/defendant were under the permissive possession of Velayudham, since both the respondent/plaintiff and appellant/defendant were employed in Government Departments and they had been away from the suit village till Velayudham chose to execute a settlement deed under Ex.B3 to the appellant/defendant. The possession of the properties by Velayudham would not have become adverse to the respondent/plaintiff in respect of a portion of Item 6 of the suit properties since he was having life interest and in respect of other items his possession was permissive. From the date on which he and his wife chose to execute a settlement deed in favour of the appellant/defendant, his possession and the possession of the appellant/defendant became adverse to the respondent/plaintiff. Such a thing happened on 08.05.1998. Therefore, as per Article 65 of the Limitation Act, the limitation for filing the suit shall be 12 years from 08.05.1998. The suit came to be filed in the year 2004, well within the period of limitation.

17. Article 106 deals with the period of limitation for filing a suit for a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an intestate against an executor or an administrator or some other person legally charged with the duty of distributing the estate. The said article is not attracted to the case on hand because the

suit is not based on a legacy or for a share of the residue bequeathed by any body, against an executor or an administrator or some other person charged with the duty of distributing the estate.

18. Article 110 does have relevance. It deals with a suit for enforcement of a right to share in the joint family property by a person excluded from the joint family. The limitation is 12 years from the date on which the exclusion becomes known to the plaintiff. As there is no other article dealing with the suit for partition between co-owners / joint owners, by analogy Article 110 of the Limitation Act 1963, can be applied to such suits. In this regard, there is some kind of overlapping of Article 65 and 110 of the Limitation Act. A suit for partition and separate possession can even be taken as a suit for possession of immovable property or any interest therein. In either case, the period of limitation shall be 12 years starting from the date of dispossession or the date from which the possession of the defendant becomes adverse to the plaintiff.

19. On the other hand, it is the case of the appellant/defendant that the entire properties were the self-acquisitions of Velayudham and Velayudham and his wife executed a settlement deed in favour of the appellant/defendant under Ex.B3 dated 08.05.1998. When the appellant/defendant and the respondent/plaintiff in this case disputed the claim of absolute title made by their father Velayudham, he filed the previous suit O.S.No.104 of 1984 on the file of Sub-Court, Virudhachalam for a declaration and permanent injunction. The said suit ended in a compromise decree, whereby two items of properties were recognized to be the absolute properties of Velayudham, and the appellant and the respondent herein, namely the sons of Velayudham were recognized to be the joint owners of other items of properties subject to a life interest for Velayudham in respect of one item alone. Yet another property described in 'C' schedule of the plaint in the former suit was recognized to be the absolute property of the appellant herein/defendant. In respect of the properties held to be jointly owned by the appellant and respondent. The respondent/plaintiff could be construed to have been excluded from joint enjoyment from the date on which the appellant/defendant asserted title based on Ex.B3 settlement deed. The exclusion could be construed to have taken place on 08.05.1998, the date of execution of Ex.B3 settlement deed, constructive notice of which could be imputed to the respondent/plaintiff as the said document is a registered document. Within twelve years thereafter, the respondent/plaintiff has filed the suit for partition and separate possession. Hence the suit cannot be held to be one barred by Article 110 of the Limitation Act in case the said Article is attracted.

20. At the time of admission of the Second Appeal as it was contended on behalf of the appellant that the suit would fall under Article 101 of the Limitation Act, 1963, the first substantial

question of law came to be framed as follows: "whether the Courts below are correct in law in passing a decree against the letter and spirit of Article 101 of the Limitation Act, 1963?". Article 101 of the Limitation Act, 1963 deals with the limitation for filing a suit upon a judgement including a foreign judgement, or a recognisance. Here, it is not a judgment of a foreign Court or an adjudication like an arbitral award, which requires recognition by the Court to be enforced. In a suit filed by Velayudham, a compromise decree declaring and demarcating the rights of the parties came to be passed on 03.02.1989. The said decree has been given effect to by the appellant himself by conveying the property allotted to him and also by Velayudham himself by executing a settlement deed in favour of the son and daughter of the respondent/plaintiff under Ex.A3 dated 09.10.1997. Till then, there was no assertion by any of the parties to the previous suit that the compromise decree was not binding upon them. Even in Ex.A3 Velayudham did not make any attempt to disown the decree. On the other hand, claiming to be the absolute owner of the two items of property which were held to be his absolute properties under Ex.A2 decree, he had executed the said settlement in favour of the sons of the respondent/plaintiff. Only after the execution of the said settlement deed, the appellant/defendant seems to have prevailed upon his father Velayudham to execute a settlement deed in respect of all other properties in his favour under Ex.B3 dated 08.05.1998.

21. Velayudham seems to have taken a stand disowning the compromise decree and making a claim that he was the absolute owner of the properties which were held to be joint properties of the appellant and respondent in the above said decree only under Ex.B3 . If at all there was any need to seek a remedy based on the compromise decree it arose only after the execution of Ex.B3 settlement deed which took place on 08.05.1998. The appellant/defendant, who was a party to the previous suit and who had signed the joint memo based on which compromise decree was passed, cannot be permitted to contend that the compromise decree was not acted upon, that too after having relied on the compromise decree in the sale deed executed by him to One Geetha. If at all he wanted to get rid of the compromise decree, he ought to have filed a suit for setting aside the compromise decree on the grounds allowed by law as no appeal would lie against such a compromise decree by a party to the compromise. Neither the appellant nor the respondent, not even Velayudham chose to file any suit for setting aside the decree or for getting the compromise decree declared to be null and void. The said compromise decree simply declared the appellant herein and the respondent herein to be the joint owners of the present suit properties. Till his joint ownership is sought to be disputed or till the possession of the appellant/defendant became adverse to the respondent/plaintiff, he need not have filed any suit for partition or for other reliefs. It is obvious from the records that only on 08.05.1998, the plaintiff's right came to be disputed. Within twelve years thereafter, the respondent /

plaintiff has filed the suit for partition and separate possession and other reliefs. Hence, it cannot be said that the suit is barred by limitation. The appellant/defendant wants to succeed by citing an irrelevant article in the Limitation Act in support of his contention that the suit is barred by limitation. Hence the first substantial question of law is answered against the appellant holding that the suit is not barred by limitation.

22. The next contention of the appellant/defendant is that a compromise decree is akin to a contract and performance or non-performance of the same would inhere or extinguish the rights created thereunder. The attempt made by the appellant / defendant is that Ex.A2 compromise decree is equivalent to a contract, rights under which would accrue to the parties on specific enforcement / performance of the same and that rights and obligations under the contract shall get extinguished if they are not performed or specifically enforced. In short, the attempt made by the appellant/defendant is that the compromise decree is a contract which needed specific enforcement and the failure to specifically enforce the same within the period of limitation resulted in extinction of the rights created in favour of the respondent/plaintiff.

23. This Court is not in a position to countenance the above said contention made on behalf of the appellant/defendant. A decree passed by a competent court either it be one passed after contest or one based on the compromise effected between the parties, is nevertheless a decree in the form of command of the Court, which is binding on the parties to the proceeding. The parties to the proceeding or anyone claiming through such party shall not be allowed to contend that they can ignore such a decree passed by the Court based on a compromise. Similarly, he cannot contend that the decree was not given effect to or not acted upon. Though the foundation for the decree shall be the agreement between the parties, it cannot be equated with a contract simplicitor, which requires voluntary performance or enforcement through Court. On the other hand, when the compromise gets the stamp of approval of the Court and the same is incorporated in the decree, making the terms of the compromise as part and parcel of the decree, it acquires a place in a higher pedestal, namely a decree passed by the Court, which shall be binding on the parties unless and until the same is set aside or declared to be null and void by a judicial process in the manner known to law. Therefore, the contention raised on behalf of the appellant/defendant that the compromise decree dated 03.02.1989, a certified copy of which has been produced as Ex.A2, has lost its binding force as if it was not acted upon and not given effect to by the parties cannot be sustained and such a contention deserves to be rejected as untenable.

24. Even if it is assumed for argument sake that the said contention is theoretically maintainable, the appellant/defendant

is bound to fail in this case on merits also. He, who contends that a compromise decree has not been given effect to and it was not acted upon, should prove that none of the parties committed any act in recognition or in furtherance of the compromise decree and that by their overt act or conduct, all the parties had totally disowned the compromise decree. In this case there is nothing on record to show that either the appellant or the plaintiff openly asserted that the compromise decree under Ex.A2 was not binding upon them. There is also no material to show that the parties, by mutual agreement, consented for giving a go by to the above said compromise decree. More specifically, nothing was done by the respondent/plaintiff to give rise to an inference that he agreed for giving up his rights under the compromise decree or that there was acquiescence on his part. On the other hand, under Ex.A3, Velayudham executed a gift settlement deed in favour of the son and daughter of the respondent/plaintiff in respect of two items of properties that were held to be the absolute properties of Velayudham as per the compromise decree and the said gift settlement was accepted by the respondent/plaintiff on behalf of his son and daughter, who were then minors, as their guardian. By the acceptance of the gift settlement in respect of those properties, which were held to be the absolute properties of Velayudham, no inference could be made that the respondent/plaintiff agreed to give up his rights declared under the compromise decree or that he kept quiet when his right under the compromise decree was sought to be denied. The very fact that Velayudham's wife Valliammal also joined with him in executing Ex.A3-Settlement deed will not give rise to any inference other than the one that Valliammal was also made to sign the settlement deed to ensure that she would not question the validity of the same at a later point of time. Apart from the absence of any act or omission on the part of the respondent/plaintiff to indicate his consent for giving a go by to the compromise decree, there are positive acts and admission on the part of the appellant/defendant which would negate his contention that the compromise decree was not acted upon and was not given effect to.

25. The respondent/plaintiff has made a clear averment in the plaint that the appellant/defendant sold the property allotted to him as per the compromise decree ("C"Schedule property of the former suit O.S.No.104 of 1984) to a third party and thereby accepted and gave effect to the compromise decree. The same was not specifically denied in the written statement. The respondent/plaintiff, while deposing as PW1, made it clear that the said property was sold by the appellant/defendant to one Geetha in the year 1992. The said part of his testimony was not challenged by any suggestion in the cross-examination. On the other hand, the appellant/defendant, while deposing as DW1, has made a categorical admission that under the compromise decree one property, which stood in the name of his father, was held to be the appellant's/defendant's property and that after the compromise decree, he (appellant/defendant) sold it to one Geetha. He has

also clearly admitted that in the said sale deed, he narrated his title as one obtained under the compromise decree passed by the Cuddalore Court. There is also a clear admission that, acting upon the compromise decree, he sold the property allotted to him under the compromise decree. For better appreciation, the relevant portions of his deposition in vernacular are reproduced hereunder:

"கடலுர் நீதிமன்றத்தில் பிறப்பிக்கப்பட்ட ஒத்திசைவுத் தீர்ப்பில் மணலுர் ரில் உள்ள இடத்தை எனது தந்தை பெயரில் உள்ள இடத்தை என பாகத்தில் எடுத்துக்கொள்ளவேண்டுமென்று உத்தரவு, பிறப்பிக்கப்பட்டது. நான் அதை கீதா என்ற ஒருவருக்கு விற்ப்பிட்டுவிட்டேன். அந்த கிரயப்பத்திரத்தில் கடலுர் நீதிமன்ற ஒத்திசைவுத் தீர்ப்பின்படி எனக்கு கிடைத்த இடம் என்று குறிப்பிட்டுள்ளேன். "

"வா.சா.2 ஒத்திசைவுத் தீர்ப்பின் மூலம் எனக்கு சில சொத்துக்களும் ஒதுக்கப்பட்டது. அதை அனுசரித்து நான் சொத்துக்களை பராதீனம் செய்துள்ளேன். "

The above said portions extracted from his deposition will make it clear that he himself accepted the compromise decree and conveyed the properties allotted to him under the compromise decree to third parties and thus, he acted in confirmation and in furtherance of Ex.A2 Compromise decree. Having acted upon the compromise decree in respect of the properties allotted to him under the compromise decree, the appellant/defendant cannot contend that the decree was not given effect to or acted upon and he is estopped from doing so. In view of the foregoing discussions, the second substantial question of law is also answered against the appellant/defendant and in favour of the respondent/plaintiff.

26. In line with the answers to the first and second substantial questions of law and for the reasons for such answers that are incorporated in the foregoing discussions, this Court comes to the conclusion that the Courts below have not committed any error or mistake in granting a preliminary decree for partition; that there is no reason to interfere with the concurrent judgments of the courts below and that the second appeal deserves to be dismissed with costs as there is no merit in it.

27. Accordingly, the second appeal is dismissed with costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

gpa

To

1.The Principal Subordinate Judge,
Virudhachalam

2.The District Munsif-cum-Judicial Magistrate
Tittakkudi

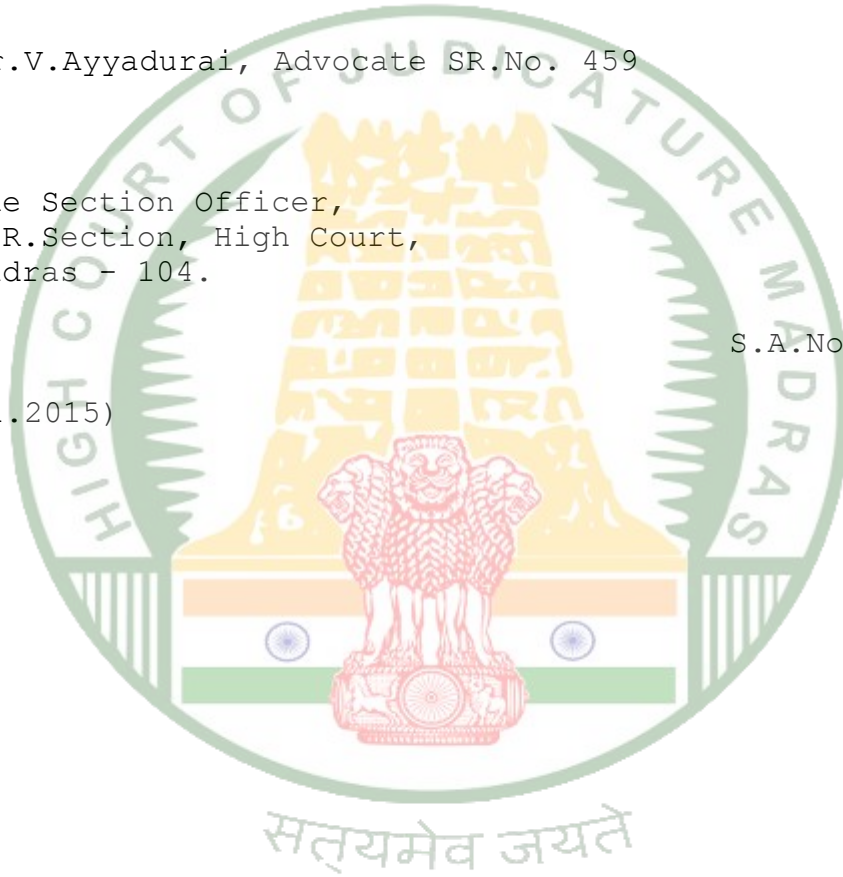
1 CC to Mr.V.Ayyadurai, Advocate SR.No. 459

Copy to

The Section Officer,
V.R.Section, High Court,
Madras - 104.

S.A.No.1463 of 2007

SV (CO)
PSI (30.01.2015)



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