

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 23.11.2015

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.132 of 2009 and M.P.1 of 2009

1. Saliappan (Deceased)
2. Murugammal
3. Minor Surya
rep.by her natural mother Murugammal,
the 2nd appellant herein

4. Ellammal
5. Susila
6. Varatharajan
7. Kuppammal
8. Munisami
9. Shanmugam

... Appellants/Plaintiffs 1, 4, & 5

(Appellants 4 to 9 brought on record as
L.Rs. of the deceased 1st appellant)

-Vs-

1. Anthonisamy
2. Savithri
3. Mariappan

... Respondents/Defendants/
3rd Plaintiff

SECOND APPEAL filed under Section 100 of Code of Civil Procedure against the judgment and decree in A.S.No.63 of 2004 on the file of the Principal Subordinate Judge, Krishnagiri dated 27.08.2008 in confirming the judgment and decree in O.S.No.34 of 1984 on the file of the District Munsif, Krishnagiri dated 01.11.1991.

For Appellants : Mr.V.Raghavachari

For 1st Respondent : Mr.J.Hariharan
for M/s.V.Niocholas

J U D G M E N T

The suit in O.S.No.34 of 1984 on the file of the learned District Munsif, Krishnagiri was filed by three plaintiffs by name, Saliappan, Krishnan and Mariappan against the 1st respondent herein. They have filed the said suit for declaration of title and for recovery of possession from the 1st respondent herein. The trial court by decree and judgment dated 01.11.1991 dismissed the suit. As

against the same, the plaintiffs filed an appeal in A.S.No.63 of 2004 on the file of the learned Principal Subordinate Judge, Krishnagiri. During the pendency of the said appeal, Krishnan, the 2nd plaintiff/2nd appellant before the lower appellate court, died, leaving behind Mrs.Murugammal and minor Suriya and they were impleaded as appellants 4 and 5 as the legal heirs of the said Krishnan in A.S.No.63 of 2004 and yet another legal heir of Krishnan was impleaded as 2nd respondent in A.S.No.63 of 2004. By decree and judgment dated 27.08.2008, the lower appellate court dismissed the appeal thereby confirming the decree and judgment of the trial court. As against the same, the 1st appellant/1st plaintiff and the appellants 4 and 5 before the lower appellate court have come up before this Court with this Second Appeal. The 3rd appellant before the lower appellate court, namely, Mariappan has been impleaded as the 3rd respondent in this Second Appeal.

2. This Second Appeal has come up before me today for admission. I have heard Mr.V.Raghavachari, the learned Counsel appearing for the appellants and Mr.J.Hariharan, the learned Counsel appearing for the 1st respondent. I have also perused the records carefully. Despite service of notice, the other respondents have not appeared before this Court.

3. The case of the plaintiffs is that the suit property was originally owned by their father Mr.Munusami Gounder, S/o.Selvappan Gounder. He was in possession and enjoyment of the same during his life time. He died intestate during the year 1973 leaving behind the plaintiffs to succeed to his estate. Accordingly, the plaintiffs are enjoying the suit property as absolute owners. After sometime, the 1st defendant trespassed into the suit property. The efforts taken by the plaintiffs to get possession recovered from him failed. Therefore, they filed the present suit for declaration of title and for recovery of possession.

4. The 1st defendant/sole defendant in the suit in his written statement contended that it is true that the suit property was originally owned by the father of the plaintiffs. But the father of the plaintiffs sold away the suit property by means of a registered sale deed dated 08.04.1958 to one Sepoy Munisamy. Thus, Sepoy Munisamy had become the absolute owner of the suit property as early as on 08.04.1958 itself. Sepoy Munisamy was in possession and enjoyment of the suit property from the said date of purchase. Mr.Sepoy Munusamy had mortgaged the suit property to one Mrs.Amalorpavamary and subsequently redeemed the same. Subsequently, on 11.04.1973, the defendants purchased the suit property for a valuable consideration by means of a registered sale deed from Mr.Sepoy Munisamy. Thus the 1st respondent/defendant is the absolute owner of the suit property and he has been in possession and enjoyment of the same. Thus, according to the 1st respondent, the suit is liable to be dismissed.

5. Based on the above pleadings, the trial court framed appropriate issues. In order to prove their case, on the side of the plaintiffs, 4 witnesses were examined and no document was exhibited. On the side of the defendants, 3 witnesses were examined and as many as 11 documents were exhibited. Having considered all the above, the trial court dismissed the suit which was confirmed by the lower appellate court. That is how the appellants are before this Court with this Second Appeal.

6. In this Second Appeal, it is submitted by the learned Counsel for the appellants that the sale deed dated 08.04.1958 (Ex.B.2) has not been duly proved by the defendant/1st respondent. It is further submitted that there is enormous oral evidence from P.W.1 to P.W.4 to the effect that the suit property was all along in the possession and enjoyment of the father of the plaintiffs till his demise and thereafter only, the trespass took place. The learned Counsel for the appellants would further submit that the courts below have failed to appreciate these facts. He would also submit that the courts below have invoked Section 90 of the Indian Evidence Act (hereinafter referred to as, 'the Act') to presume the execution of the Ex.B.2 which according to the learned Counsel is an erroneous approach. He would further submit that if only the signature in the document or the thumb impression is proved, then due execution of the document can be presumed under Section 90 of the Act. He would also submit that as per Rule 60 of the Registration Rules, the thumb impression of an illiterate executant cannot be dispensed with by the Registering Officer while registering a document presented for registration. According to the learned Counsel for the appellants, there was no 'keeral' found in the document and there was no thumb impression made by Munusamy Gounder. Thus according to the learned Counsel for the appellants, the plaintiffs have proved that Ex.B.2 is not a valid document and the same was not at all executed by his father.

7. But the learned Counsel for the 1st respondent would vehemently oppose this Second Appeal. According to him, there is no substantial question of law at all involved in this Second Appeal. Further, according to him, all the questions raised by the learned Counsel for the appellants would be only on facts and therefore, on such factual questions, the Second Appeal cannot be admitted. Further, the learned Counsel for the appellants would submit that what is presumed under Section 90 of the Act is due execution of the document which is 30 years old.

8. Here in this case, on the date of production of Ex.B2 from the lawful custody of the 1st respondent, it was already 30 years old. Therefore, according to him, the presumption of due execution of the document is very much available in favour of the 1st respondent. He would further submit that in order to further strengthen the case of the 1st respondent, the scribe of Ex.B.1, namely, D.W.2 has been examined, who has categorically stated about the due execution of the

same. He would further submit that the other parties to Ex.B.2 were no more and therefore, they could not be examined. Thus, according to the learned Counsel, the execution of Ex.B.2 for valuable consideration has been duly proved by the defendant. He would further submit that all the documents such as revenue records were produced before the trial court and the receipts for payment of Kist would go to show that the suit property has been all along in the possession and enjoyment of the 1st respondent and before him by his vendor. He would rely on the patta issued by the Government also.

9. I have considered the above submissions.

10. The whole case of the plaintiff revolves around Ex.B.2 Sale Deed said to have been executed by their father Mr.Munusamy Gounder. According to the defendant, the father of the plaintiffs Munusamy Gounder who was the original owner of the suit property sold away the same under Ex.B2 to yet another Munisamy known as Sepoy Munisamy and from that Munisamy the defendant has purchased the said property. Now, the question is as to whether the execution of Ex.B.2 has been duly proved or not. The courts below have given a factual finding on this to conclude that Ex.B.2 was duly executed only by the father of the plaintiffs viz. Munusamy Gounder in favour of Sepoy Munusamy and therefore, the same is valid. I am in full agreement with the learned Counsel for the 1st respondent that this is essentially a question of fact. The courts below have also relied on Section 90 of the Indian Evidence Act to invoke the presumption. Section 90 of the Indian Evidence Act reads as follows:

"90. Presumption as to documents thirty years old—Where any document, purporting or proved to be thirty years old, is produced from any custody which the court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested."

11. It is the contention of the learned Counsel for the appellants that in the instant case, since the document does not contain either the thumb impression or the signature of the father of the plaintiffs, Section 90 of the Act cannot be made applicable. This argument, though attractive, does not persuade me at all. It is not at all the case of the plaintiffs before the trial court that there was no thumb impression of their father found in the document. Therefore, there was no occasion for the courts below to discuss about the thumb impression found in the document.

12. As rightly pointed out by the learned Counsel for the appellants under Rule 60 of the Registration Rules, the document should be affixed with the thumb impression of the executor. The very fact that Ex.B2 has been duly registered would give rise to a presumption under Section 114 of the Evidence Act that the document was registered only after completion of all the legal formalities, more particularly, the formalities required under Rule 60 of the Registration Rules. The learned Counsel for the appellants is not in a position to demonstrate to this Court that Ex.B.2 does not contain the thumb impression or "'keeral'" of the Munusamy Gounder.

13. What can be presumed under Section 90 of the Indian Evidence Act, in the case of a document executed or attested is that it was duly executed and attested by the persons by whom it is purported to have been executed and attested. A plain reading of Section 90 of the Act would go to show that it empowers the court to presume the execution of the document of 30 years old. Here in this case, the document shows that it was purportedly executed by the father of the plaintiffs Mr.Munusamy Gounder. It is a registered document. Therefore, it is permissible to rise the presumption under Section 90 of the Act that the said document was duly executed by Munusamy Gounder, the father of the plaintiffs in favour of Sepoy Munisamy.

14. Of course, this presumption under Section 90 of the Act is rebuttable. It is for the plaintiffs to rebut the said presumption either by means of direct evidence or by means of circumstantial evidence. Here in this case, in my considered view, the plaintiffs have failed to rebut the said presumption raised under Section 90 of the Act.

15. Per contra, the said presumption raised under Section 90 of the Evidence Act in favour of the 1st respondent is further fortified by the evidence of D.W.2. D.W.2 is the scribe of the document. He has categorically stated about the execution of the document by the father of the plaintiffs in favour of Sepoy Munisamy. The other parties to the document are no more. Strangely, the plaintiff had not impleaded Shepoy Munisamy, the party to Ex.B.2 as a party to the suit. From and out of the evidence of D.W.2, in my considered view, the presumption raised under Section 92 of the Act has been further fortified. Looking at the case in a different angle, even in the absence of presumption under Section 90 of the Act, I have to hold that due execution of Ex.D.2 has been clearly established by the 1st respondent by the oral evidence of D.W.2 and the other circumstances.

16. Let me now discuss about the circumstances which are in favour of the 1st respondent. On the side of the plaintiffs, no document whatsoever has been filed to prove that on or after 08.04.1958, their father Munusamy Gounder was in the possession and enjoyment of the suit property till his demise in the year 1973. Had it been true that the said document was not executed by Munusamy

Gounder and had it been true that Mr. Munusamy Gounder was in possession and enjoyment of the same on or after 08.04.1958, certainly, he would have paid Kist to the Government and for the cultivation of the land by him as the land is an agricultural land, entries would have been made in all the revenue records. But unfortunately, no such document in the name of Munusamy Gounder has been filed to show that he was in possession and enjoyment of the suit property on or after 08.04.1958. But on the side of the defendants, as many as 11 documents have been marked. Ex.B.3 is the Mortgage Deed dated 12.01.1972 executed by Sepoy Munusamy in favour of Amalorpava Mary. Ex.B.4 patta stands in the name of the defendant. The 1st respondent has paid Kist also to the Government. All these documents would go to show that the suit property has been in possession and enjoyment of the defendant and the suit property was not in the possession of the father of the plaintiff on or after 08.04.1958. Having considered all the above facts, the trial court dismissed the suit and the lower appellate court also confirmed the same.

17. But the learned Counsel for the appellants would rely on a judgment of this Court in Rajammal vs. Ramasami and three others reported in 1998-1-L.W.451 wherein the genuineness of a Will was under challenge. In that case, on appreciating the facts, this Court has held that since there was no "keeral" of the executor, it was not a natural Will and therefore, the said document is not genuine. In the instant case, the facts are different. As I have already narrated, not only presumption, but also there are other circumstances to prove that Ex.B.2 was duly executed by the father of the plaintiffs in favour of Sepoy Munisamy, the vendor of the defendants. The learned Counsel for the 1st respondent would rely on a judgment of the Hon'ble Supreme Court in Om Prakash (dead) through his Lrs. vs. Shanti Devi and others reported in 2015-3-L.W.476 wherein the Honourble Supreme Court has elaborately dealt with the scope of the Section 90 of the Evidence Act. As I have already narrated, applying the guidelines in the said judgment, the courts below were right in invoking the presumption under Section 90 of the Act in favour of the 1st respondent.

18. In view of the above discussion, I find that there is no perversity in the findings of the courts below. At any rate, there is no question of law much less a substantial question of law involved in this Second Appeal. In such view of the matter, the Second Appeal deserves only to be dismissed.

19. In the result, the Second Appeal fails and the same is accordingly dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.
Tsi

Sd/-
Assistant Registrar (CS-II)

/True Copy/

Sub-Assistant Registrar

To

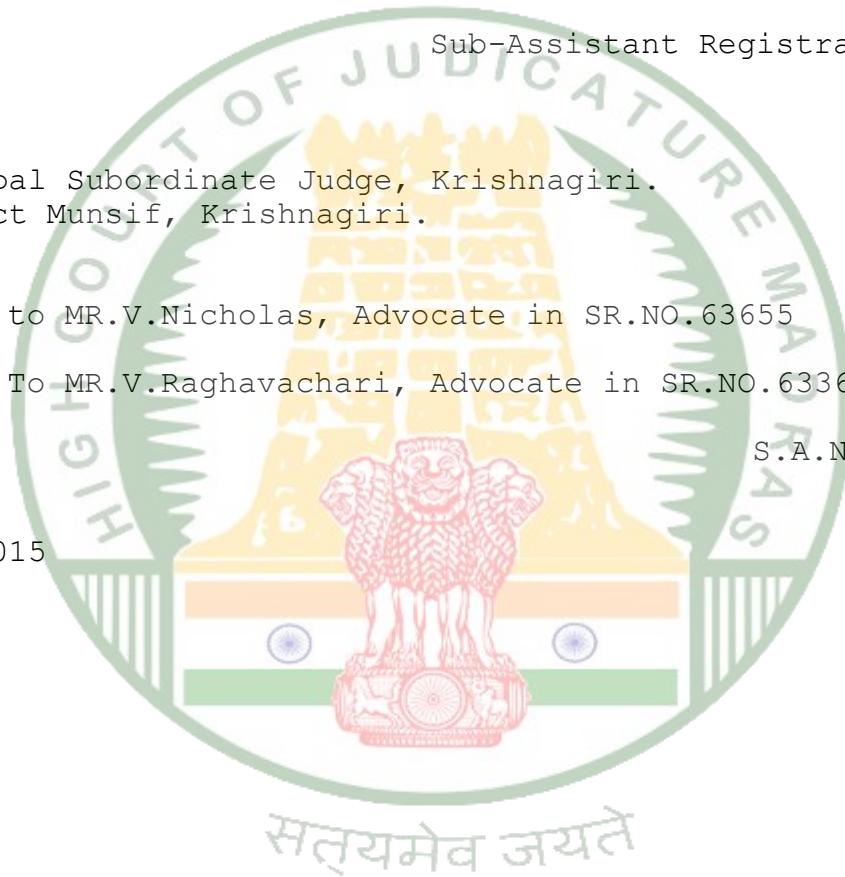
- 1.The Principal Subordinate Judge, Krishnagiri.
- 2.The District Munsif, Krishnagiri.

+2 C.Cs to MR.V.Nicholas, Advocate in SR.NO.63655

+1 C.C. To MR.V.Raghavachari, Advocate in SR.NO.63364

S.A.No.132 OF 2009

PVR(CO)
sd : 29/12/2015



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