

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 24.03.2015

CORAM :

THE HON'BLE MS. JUSTICE K.B.K.VASUKI

Second Appeal No.916 of 2007

and Tr.AS.No.26 of 2015

and MP.No.1 of 2015

Second Appeal No.916 of 2007

1.Sivalingam

2.Selvamani

... Appellants/Plaintiff

Vs.

1.Pappayeammal @ Pavayeammal (deceased)

2.Saravanakumar

3.Sakthivel

4.Gopikanth (R4 brought on record as

legal heir of the deceased R1

vide order of the Court

dated 07.01.2015 in MP.No.3 of 2013)

... Respondents/Defendant

Second Appeal is filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 09.08.2007 made in A.S.No.94 of 2006 on the file of the Additional District Judge, Bhavani (Fast Track Court No.IV) reversing the Judgment and Decree dated 12.12.2005 made in O.S.No.221 of 2005 on the file of the Principal District Munsif, Bhavani.

For Appellants : M/s.R.Subramanian

For Respondents : M/s.A.Madhumathi for R2 and R3
M/s.C.Jagadish for R4
R1 - Died.(Steps taken)

Tr.AS.No.26 of 2015

1.Saravanakumar.k

2.Pappayeammal @ Pavayeammal (deceased)

.. Appellants

Vs.

Gopikanth represented
by Power Agent C.Palanivelu

.. Respondent/Plaintiff

Transfer Appeal Suit is filed under Order 41 Rule 1 read with section 96 of Civil Procedure Code against the Judgment and Decree dated 12.12.2005 made in OS.No.166 of 2005 on the file of the First Additional District Munsif, Bhavani.

For Appellants : M/s.A.Madhumathi

For Respondent : M/s.C.Jagadish

COMMON JUDGMENT

The plaintiffs in OS.No.221 of 2005 have come forward with the present second appeal SA.916 of 2007 against the judgment made in AS.No.94 of 2006 thereby reversing the judgment and decree of the trial Court made in OS.No.221 of 2005. Whereas, Transfer AS.No.26 of 2015 is filed by the defendants in OS.No.166 of 2005 against the relief of permanent injunction granted by the Trial Court.

2.The subject matter of the suit in OS.No.221 of 2005 arising out of which is the present Second Appeal and the subject matter of the suit in OS.No.166 of 2005 arising out of which is the transferred Appeal Suit are admittedly the properties covered under settlement deed dated 08.03.2005 executed by one deceased S.M.Palaniappa Gounder in favour of his grand son Gopikanth who filed the permanent injunction suit through his power agent. While, OS.No.221 of 2005 is filed in respect of the property in question by the purchaser of the property from the settlee Gopikanth vide registered sale deed dated 25.05.2005 and the relief sought for in the suit is for declaring that the sale deed dated 27.05.2005 executed by Pappayammal @ Pavayammal in favour of the 2nd defendant/Saravanakumar and 3rd defendant/Sakthivel is not binding on the plaintiff and for consequential injunction restraining the defendants from interfering with his peaceful possession and enjoyment of the suit property, the other suit OS.No.166 of 2005 is filed by the settlee/Gopikanth in respect of the other property covered under the settlement deed, for permanent injunction restraining the defendants 1 and 2/ Saravanakumar and Pappayammal @ Pavayammal, their men, agents or assignees in interest from interfering with his peaceful possession and enjoyment of the suit property.

3.The facts which are relevant for consideration herein are as

follows : The properties covered under the settlement deed originally belonged to SM.Palaniappa Gounder. Pappayammal @ Pavayammal was admittedly the first wife of SM.Palaniappa Gounder. Palaniappa Gounder and Pappayammal @ Pavayammal were separated from 1970 and Gopikanth was the grand son of Palaniappa Gounder through his legitimate son Raju and the father Palaniappa Gounder and his son Raju by partition deed dated 05.05.1969 divided the joint family properties among themselves and Palaniappa Gounder was allotted "A" schedule and Raju was allotted "B" schedule and after the partition between the father and son the parties had been in possession and enjoyment of their respective portions by exercising absolute ownership over the same.

4. During the separation of the husband and wife Pappayammal @ Pavayammal was duly paid maintenance and Palaniappa Gounder executed a will in favour of Gopikanth on 11.02.1983 bequeathing all the properties in his favour and subsequently executed another will in favour of Gopikanth and others and the last document executed by Palaniappa Gounder was the registered settlement deed dated 08.03.2005 in respect of the properties allotted to him in the partition deed in favour of Gopikanth. Thereafter, Palaniappa Gounder died on 19.04.2005. The Gopikanth had been during that point of time residing in USA and an NRI and got married to the daughter of one Palanivelu and Gopikanth executed registered Power of Attorney dated 26.04.2005 in favour of his father-in-law Palanivelu and Palanivelu on the strength of the same executed a sale deed in favour of one Sivalingam and Selvamani who are the plaintiffs in OS.No.221 of 2005 and respondents in AS.No.94 of 2006.

5. In the meanwhile, Pappayammal @ Pavayammal claiming herself to be the sole heir of deceased Palaniappa Gounder started claiming title in respect of the property belonging to Palaniappa Gounder and started effecting transaction in respect of the same and sold 1/10th share in the suit property in favour of the defendants 2 and 3 by name Saravanakumar and Sakthivel. Thereafter, serious title dispute arose between Pappayammal @ Pavayammal and Gopikanth. While the grandson Gopikanth claims absolute title over the suit property on the strength of Ex.B3/registered settlement deed dated 08.03.2005, Pappayammal @ Pavayammal claims her title in her capacity as the legally wedded wife of the deceased Palaniappa Gounder. The parties started setting up title in themselves and claims to be in possession and enjoyment of the property and started denying the title possession and enjoyment of the opposite party and the same resulted in two suits in OS.No.221 of 2005 by the purchasers of the suit property from the grand son/settlee and OS.No.166 of 2005 by the grand son/settlee in respect of other properties. While the purchaser filed the suit against the first wife and the purchasers from her as the defendants 1 to 3, the settlee grandson filed the suit against the first wife of his grandfather/Pappayammal @

Pavayeammal and one of the purchasers from her as the defendants 1 and 2.

6. In OS.No.221 of 2005 written statement was filed by Saravanakumar and the same was adopted by the first defendant/Pappayeammal @ Pavayeammal and the third defendant/Sakthivel. Whereas in OS.No.166 of 2005, the written statement was filed by the first defendant/Saravanakumar and the same is adopted by the second defendant/Pappayeammal @ Pavayeammal. In short, Pappayeammal @ Pavayeammal did not file any separate written statement in both the suits. In the written statement filed in both the suits, the defendants have denied the relationship between the deceased Palaniappa Gounder and Gopikanth and denied the theory of separation of the husband and wife and denied the valid execution of settlement deed by Palaniappa Gounder in favour of Grandson/Gopikanth.

7. According to the defendants, Gopikanth was not the direct grandson of the deceased Palaniappa Gounder but only the grandson of one of his concubines and had no legitimate relationship with the deceased Palaniappa Gounder. It is their further case that the deceased Palaniappa Gounder was not in good physical and mental health and he was in coma and was unable to identify the persons and understand things and was not in a position to affix his signature or execute any document and he died due to his illness leaving behind Pappayeammal @ Pavayeammal as his only sole heir and Pappayeammal @ Pavayeammal being the only legal representative, succeeded to the property.

8. The parties in the separate trial conducted in both the suits, adduced oral and documentary evidence on both sides. In OS.No.221 of 2005, the second plaintiff examined himself and his witness Shanmugasundaram as PW1 and PW2 and produced Exs.A1 to A11 documents. In the other suit OS.No.166 of 2005, the Power of Attorney and one of the witnesses to the document and the Doctor who was attending to Palaniappa Gounder and other witnesses were examined as PW1 to PW5 and the first defendant and his witness were examined as DW1 and DW2 and produced Exs.A1 to A13 and Exs.B1 to B4 and Exs.C1 and C2 were also received as evidence.

9. The trial Court on the basis of the available evidence adduced in both the suits found that Gopikanth was the grandson through one Raju who was the legitimate son of Palaniappa Gounder and Palaniappa Gounder and his son effected partition of the properties belonging to the family and Palaniappa Gounder executed settlement deed while he was in good health and normal state of mind in respect of all his properties in favour of his grandson Gopikanth and he was not having cordial relationship with his wife and the husband and wife were separated from 1970 and after the execution of the settlement deed, no property was left out to be succeeded by his first wife and the execution of gift deed was duly and validly established and the

settlee and the purchaser of the portion of his property have been since the date of settlement deed and since the date of purchase, in possession and enjoyment of the property and the transaction effected by Pappayeammal @ Pavayeammal in favour of other defendants was without any right to do so and the same is not binding on the settlee and the defendants cannot on the strength of such sale deed be permitted to interfere with the respective plaintiff's peaceful possession and enjoyment of the properties.

10. Aggrieved against the same, the defendants in OS.No.221 of 2005 preferred AS.No.17 of 2006 which was renumbered as AS.No.94 of 2006. The lower Appellate Court reversed the findings of the Trial Court mainly on the ground that the genuineness and validity of the settlement deed having been denied by the defendants, the burden is on the plaintiffs to prove the same and on the failure of the plaintiffs to prove the same, the plaintiffs are disentitled to seek any relief. The other ground on which the lower appellate court disagreed with the findings of the trial court is that the trial court finding is based on the evidence adduced in the other case and such course adopted by the trial Court is bad in law. Aggrieved against the same, the plaintiffs in OS.No.221 of 2005 have come forward with the second appeal in SA.No.916 of 2007 before this Court.

11. The Second Appeal is admitted on the following substantial questions of law :

(i) Whether the Lower Appellate Court is right in holding that the evidence in OS.No.166/2005 ought not to have been taken into consideration more so when both the suits were simultaneously tried by the same District Munsif?

(ii) Whether the Lower Appellate Court is right in holding that Palaniappa Gounder had no right to execute a settlement deed dated 8.3.2005, more so when the property was allotted to him in partition that took place on 5.5.1969? and

(iii) Whether the Lower Appellate Court is right in allowing the plea relating to the nature and character of the property at the appellate stage in the absence of any pleading?

12. In the meanwhile, the defendants who offered a decree for permanent injunction in OS.No.116 of 2005 preferred AS.No.12 of 2006 before the Sub Court, Bhavani and the same was subsequently renumbered as AS.No.103 of 2006. AS.No.103 of 2006 and AS.No.94 of 2006 against OS.No.221 of 2005 though were pending before the same court, not tried together and AS.No.94/06 was separately heard and was disposed of against the plaintiffs, resulting in SA.No.916 of 2007. That being so, TR.CMP.No.24 of 2009 came to be filed before this Court for withdrawing and transferring AS.No.103 of 2006 to be

heard and disposed of along with SA.No.916 of 2007 and Tr.CMP.No.24 of 2009 by order dated 20.04.2009 was ordered as prayed for by this Court. In compliance with the order, AS.No.103 of 2006 pending on the file of Fast Track Court, Bhavani was transferred to this Court for being heard along with SA.No.916 of 2007 and AS.No.103 of 2006 was renumbered as Tr.AS.No.26 of 2015.

13.While so, the first appellant in Tr.AS.No.26 of 2015 filed MP.No.1 of 2015 for receiving the petition mentioned documents i.e, (i)reply under the RTI Act dated 29.01.2009 by DSP, Assistant Public Information Officer (ii)reply under the RTI Act dated 12.10.2009 by Regional Passport Office, Chennai and (iii)reply under RTI Act dated 02.12.2009 by Joint Sub-Registrar-2, Namakkal, Mr.Kathirvel as additional documents on the side of the appellant/defendants in OS.No.116 of 2005.

14.Heard the rival submissions made on both sides and perused the records.

15. The main controversy in issue involved in both the Second Appeal and the Transfer Appeal Suit is the due and valid execution of the settlement deed dated 08.03.2005 by Palaniappa Gounder in favour of Gopikanth. As the joint hearing of the second appeal and the transfer appeal suit is not objected to and as the issue involved in both the suits are one and same arising out of which are the second appeal and the transfer appeal suit and as the same are now pending determination of this Court, this Court is of the view that the evidence adduced in both the suits can be appreciated together for deciding the main controversy in issue as stated above and there is no legal impediment against such course adopted by the Court.

16.The fact that the property originally belonged to Palaniappa Gounder ancestrally and through independent purchase and the same was partitioned between Palaniappa Gounder and his son Raju is not seriously disputed. Though the relationship between Palaniappa Gounder and Gopikanth was seriously disputed in the written statement the same was given up during trial and the grand father and the grandson relationship between them was admitted on the side of the defendants during trial. The settlement deed dated 08.03.2005 is only in respect of the properties allotted to Palaniappa Gounder in the partition deed. The joint status of the father and son having been severed by virtue of the partition during 1969 and as the settlement deed executed is in respect of the properties allotted to Palaniappa Gounder in partition, the right of Palaniappa Gounder to deal with the same on his own manner cannot at all be questioned.

17.There are ample evidence available herein to show that Palaniappa Gounder and Pappayammal @ Pavayammal were not living together and separated in 1970 and Pappayammal @ Pavayammal was residing elsewhere by getting maintenance and she was not even

allowed to see her husband during his last days and she was unable to be with him during his last days and unable to participate in his funeral and was not able to perform any of his last rites.

18.It may be true that the defendants have seriously denied the valid and due execution of settlement deed dated 08.03.2005. However, the same is not the first document executed in favour of Gopikanth and there were earlier two Wills one in favour of Gopikanth and another in favour of Gopikanth and others and this settlement deed is the third document executed by Palaniappa Gounder in favour of his grandson Gopikanth in respect of the property belonging to him. There is absolutely no reference and no averment in the written statement filed by the defendants about the execution of the other document and the physical and mental capability of Palaniappa Gounder to execute the other document. The attack raised in the written statement is only in respect of the settlement deed dated 08.03.2005, the execution and the circumstances under which the same was executed and the physical and mental state of mind of Palaniappa Gounder to execute one such document are all duly established in OS.No.166 of 2005 through the examination of the material witnesses on the plaintiff's side. The material witnesses are the then Sub Registrar and the Doctor who was attending on Palaniappa Gounder and one of the witnesses in the document etc., No ground was at all made out by the defendants to disbelieve their version in this regard.

19.As a matter of fact, the evidence adduced on the side of the defendants is of no much help to reject the evidence of the plaintiff side witnesses. The defendants have not adduced satisfactory and sufficient evidence to rebut the case made out by the plaintiff through their witnesses, regarding the health condition and mental state of the deceased Palaniappa Gounder before and on the date of execution of the settlement deed. As such, the evidence adduced herein are sufficient enough to uphold the genuineness, legality, validity of the settlement deed dated 08.03.2005 and the mental stability of the settlor to execute the settlement deed in favour of his only grandson through his only son. As a matter of fact, the competent person to speak against the material aspects in this regard is Pappayammal @ Pavayammal. However, for the reasons best known to her, she avoided the witness box.

20.After the execution of the settlement deed in favour of grandson the settlor lived for more than a month and passed away and neither of the defendants were able to show that they happened to meet or happened to be with the deceased either in the hospital or in the house during his last days or had any direct knowledge about the state of affairs prevailing therein. That being so, after the execution of the sale deed, the settlor had no right over the property in question, which was already handed over to the settlee. The settlee thereafter executed a Power of Attorney in favour of his father-in-law, on the strength of which, the father-in-law was

authorised to sell the property and sold the property and also instituted the other suit for permanent injunction. Though, serious argument is raised herein regarding the valid execution and registration of the Power of Attorney and the maintainability of the suit filed by the Power of Attorney holder, the same is for want of any pleadings in either of the written statements filed in both the suits need not be gone into.

21. Even otherwise, the objection raised herein is liable to be negatived by virtue of Section 33 of the Registration Act, which deals with the Power of Attorney recognizable for the purposes of Section 32. Section 32 deals with the persons authorised to present document for registration and one of the persons authorised to present the document for proper registration is by the agent of the person executing the document, duly authorised by power of attorney executed and authenticated in manner mentioned under the Act. According to the defendants, as the power of attorney was not executed in any of the manner contemplated under Section 33(a) to (c) of the Act the POA is not authorised to present the document for registration. Whereas the learned counsel for the appellants in the second appeal by resorting to Section 33(a) would defend the validity of the power of attorney. It is argued herein that the principal was as per the recitals contained in the power of attorney residing in the address given in the document in India, as such the power of attorney is executed and authenticated in the manner known to law and is validly recognizable in law.

22. The learned counsel for the contesting defendants by relying upon the judgment reported in AIR 2005 SC 2583 - Bhagwan Dass and another V. Kamai Abrol and others would contend that the word "residence" is generally understood as referring to a person in connection with the place where he lives, and may be defined as one who resides in a place or one who dwells in a place for a considerable period of time as distinguished from one who merely works in a certain locality or comes casually for a visit and the place of work or the place of casual visit are different from the place of "residence" and the address mentioned in the document is not the residence as contemplated under Section 33. In my considered view, the same is not applicable to the facts of the present case in hand. The Hon'ble Supreme Court in the same paragraph further observed that "first is in the form of permanent and temporary residence and the second classification is based on defacto and de jure residence. The defacto concept of residence can also be understood clearly by the meaning of word 'residence' as given in the Black Law Dictionary. It is given that the word residence means bodily presence as an inhabitant in a given place."

23. In the present case, the settlee being permanent resident of USA has in the document given the address where he temporarily

resides during his visit to India and the same is sufficient enough for fulfilling the requirement of Section 33. As such, no legal objection can be permitted to be raised against the recognizable nature of the document under Section 33 of the Registration Act. The document is duly executed and is hence recognizable under Section 33 and the person authorised under the same duly presented the sale deed for registration and the sale deed is hence validly presented and registered and the plaintiffs/appellants in the second appeal are under such deed duly conveyed right title and interest in respect of the suit property.

24.The possession and enjoyment of the property with the settlee since the settlement deed and the possession of the purchaser from the settlee through their tenants is also duly established through the documentary evidence adduced on the side of the plaintiffs in both the suits. The defendants in both the suits are unable to adduce satisfactory rebuttable evidence. The defendants except producing the sale deeds, power of attorney and other documents are not able to produce any other records to establish their possession and their plea of possession is hence rightly denied by the courts below. This Court finds no reason to interfere with such factual findings based on which is the well considered judgment of the trial Court in OS.No.166 of 2005.

25.As far the judgment and decree of the lower Appellate Court in AS.No.94 of 2006 is concerned, the same is purely based on misconception of law and facts. The settlement deed having been duly presented by the settlor and having been duly registered after complying with the all the legal formalities, the question of rejecting the same mainly on the basis of registration of the same in the house of the settlor on the health grounds does not arise herein. The house registration as explained by the then Sub Registrar was due to old age and ailing health of the settlor and not otherwise. In that event, the course adopted by the lower Appellate Court in casting the burden on the plaintiffs to prove due execution of the settlement deed, is nothing but perverse and unsustainable and the judgment and decree of the lower Appellate Court is hence liable to be interfered with. The substantial questions of law are accordingly answered in favour of the appellants.

26.Insofar as MP.No.1 of 2015 is concerned, the same is for receiving additional documents i.e, the copy of the reply received from the Information Officer of different department regarding the valid issuance of passport for the plaintiff/Gopikanth and valid registration of power of attorney by Gopikanth. The information sought for was regarding the Passport issued by the USA by wrongly mentioning the same as issued by Indian Embassy. As such, the reply issued by the different officials that too much after the disposal of the case and without raising any pleading, will in no way advance the

case of the defendants and are unnecessary and no additional documents need to be received at this stage and miscellaneous petition is liable to be dismissed.

27.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. The Transfer Appeal Suit is dismissed. No costs. MP.No.1 of 2015 is also dismissed.

-Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

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To

- 1.The Additional District Judge,
(Fast Track Court No.IV),
Bhavani, Erode.
- 2.The Principal District Munsif,
Bhavani.
- 3.The First Additional District Munsif,
Bhavani.

+2 cc to Mr.C.Jagadesh,Advocate(sr.16607)
+1 cc to Ms.A.Madhumathi, Advocate(sr.16551)
+1 cc to Mr.R.suibramanian,Advocate(sr.16539)

सत्यमेव जयते

Second and Appeal No.916 of 2007
and Tr.AS.No.26 of 2015

TEJ(co)
cp 12/10/2015

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