

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.04.2015

CORAM

THE HONOURABLE MS. JUSTICE R.MALA

S.A.No.1688 of 2003

Judgment reserved on 23.04.2015	Judgment pronounced on 29.04.2015
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E.Ramaiah .. Plaintiff/Appellant/Appellant

Vs

1.Thamizhchelvan

2.Perumal

3.Kanniammal

.. Defendants/Respondents/
Respondents

Prayer: Second appeal filed under Section 100 of CPC against the Judgment and Decree dated 28.10.2002 in A.S.No.5 of 1999 on the file of the Additional District Court (Fast Track Court II), Kanchipuram, confirming the Judgment and Decree dated 24.09.1998 in O.S.No.24 of 1993 on the file of the Additional District Munsif Court, Kanchipuram.

For Appellant : Mr.N.Ramanujam
Mr.K.S.Raman
For Respondents : Mr.S.Viswanathan
Mr.A.Muthukumar

JUDGMENT

This second appeal arises out of the Judgment and Decree dated 28.10.2002 in A.S.No.5 of 1999 on the file of the Additional District Court (Fast Track Court II), Kanchipuram, confirming the Judgment and Decree dated 24.09.1998 in O.S.No.24 of 1993 on the file of the Additional District Munsif Court, Kanchipuram.

2.The averments made in the plaint are as follows:-

The suit property was purchased by the plaintiff from one M.V.Krishnamachariar and his son Vasudevan on 04.12.1992 under a registered sale deed for a valuable consideration. Prior to sale, the plaintiff was inducted into possession of the suit properties by his vendor M.V.Krishnamachariar as lessee and he has been cultivating the same for number of years and paying melwaram to the vendor as

tenant. The plaintiff is in possession and enjoyment of the suit property by cultivating the same and paying kist to Government. While so, the defendants who have no manner of right, title or possession attempted to dispossess the plaintiff from the suit property on 04.01.1993 and it was prevented at the intervention of villagers. Further the defendants were creating a cloud over the title of the plaintiff though they are his own brothers and mother. Hence, the plaintiff filed a suit in O.S.No.24 of 1993 for declaration of title to the suit schedule properties and consequential permanent injunction restraining the defendants and their men from in way interfering with the plaintiff's peaceful possession and enjoyment of the suit properties.

3.The gist and essence of written statement filed by the first defendant adopted by the defendants 2 to 4 are as follows:

The allegations made in the plaint were denied as highly mischeived and false by the defendants. The defendants submitted that the suit properties originally belonged to the said M.V.Krishnamachariar. The plaintiff is the eldest son of family consisting of himself and the defendants. The plaintiff and the defendants purchased the suit properties from the said M.V.Krishnamachariar with the joint family funds. In order to avoid heavy stamp duty, a general power of attorney was executed in the name of the 3rd defendant, the mother to avoid disputes between brothers. Since then, the plaintiff and the defendants were enjoying the suit properties and paying kist to the Government. Thereupon, taking advantage of the absence of the first defendant from the Village, the plaintiff by misrepresentation insisted upon the 3rd defendant to executed a registered settlement deed dated 16.10.1990 in favour of the plaintiff and the 2nd defendant. Thereafter, when the 1st defendant confronted the settlement deed, the 3rd defendant cancelled the said settlement deed on 12.06.1992. Aggrieved by that, the plaintiff began to act adverse to the interest of the joint family. Thereafter, at the request of the defendants 1 and 2, the 3rd defendant divided the properties and executed a registered deed on 08.09.1992 in respect of two shares in favour of defendants 1 and 2 leaving a portion to be given to the plaintiff. But the plaintiff surrendered the original general power of attorney and the kist receipts to the vendor M.V.Krishnamachariar and instigated him to issue a legal notice to the defendants on 27.10.1992 making untenable allegations. Thereafter, the plaintiff obtained a impuged sale deed dated 04.12.1992 from the said M.V.Krishnamachariar which is not valid and binding upon the defendants. Hence, they pray for dismissal of the suit.

4.The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1, P.W.2 D.W.1, D.W.2 and Exs.A1 to A15 and Exs.B1 to B11, dismissed the suit. Aggrieved against the

judgment and decree of the trial court, the plaintiff preferred an appeal in A.S.No.5 of 1999 on the file of the Additional District Munsif Court, Kanchipuram.

5.The learned First Appellate Court has considered the argument advanced on either side and framed necessary point for consideration and confirmed the Judgment and Decree passed by the Trial Court and dismissed the appeal. Against the Decree and Judgment of the first Appellate Court, the present second appeal has been preferred by the plaintiff.

6.At the time of admission of the above second appeal, the following substantial questions of law were framed for consideration.

"1.Whether the Courts below are correct in not holding that there is an estoppel by document viz., Ex.A12 to belie the case of the respondents?

2.Whether the Appellate Court below is in correct in not comparing the signatures of the 3rd respondent in Ex.A12, Cancellation of Power, with the signature in ex.B3 Settlement deed executed by the 3rd respondent?"

7.Challenging the concurrent judgment and decree of both the Court below, the learned counsel for the appellant/plaintiff would submit that the appellant purchased the property under Ex.A1 and in pursuance of sale deed, patta has been issued under Ex.A7. The sale deed has been executed after the Power of Attorney executed by the vendor M.V.Krishnamachariar in favour of third respondent/third defendant under Ex.A11, that has been revoked under Ex.A12 on 12.06.1990 and then only, the sale deed has been executed in Ex.A1 and in pursuance of the sale deed, the appellant/plaintiff is in possession and enjoyment of the same as a owner and before the sale as a tenant he is enjoying the property and that has been conceded by the vendor M.V.Krishnamachariar. He further submitted that even though the appellant and respondents 1 and 2 are own brothers and the 3rd respondent is the mother and they constitute a joint family, the property purchased under Ex.A1 by the appellant/plaintiff is a separate property. He further submitted that the Trial Court has erroneously held that revocation of Power of Attorney has not been intimated to the Power of Attorney. But since it is a bilateral revocation of the same, notice is not necessary. He further submitted that the Trial Court has failed to compare the signature in Ex.A12, namely, revocation endorsement and Ex.A15/settlement deed executed by the third respondent. Hence, he prayed for setting aside the judgment and decree passed by both the Court below. To substantiate his argument, he relied upon the decision reported in 1999 (1) CTC 245 (Rajiah Nadar vs. Manonmani Ammal)

8.Refuting the same, the learned counsel appearing for the respondents would submit that the evidence of P.W.1 itself states

that in a joint family even a junior member can be the Manager of the joint family property. He would submit that to avoid heavy stamp duty after payment of the sale consideration, Power of Attorney deed has been executed in favour of the mother, Kanniammal/the third respondent. The third respondent executed the settlement deed in favour of the appellant/plaintiff and the second respondent/second defendant under Ex.A15 and that has been subsequently revoked under Ex.B4 on 18.05.1992. further, the third respondent has executed a sale deed on 08.09.1992 under Ex.A13 in favour of the second respondent and under Ex.A.14 in favour of the first respondent. So, the Trial Court has rightly held that the Power of Attorney has not been cancelled before the sale in favour of the respondents 1 and 2. He further submitted that even if the Court came to the conclusion that Power of Attorney is cancelled but the sale has been executed in faovur of one of the co-owner out of the joint family property, the burden is on the Manager to prove that he has separate source of income to purchase the property. He has also submitted that the appellant/plaintiff has not come to the Court with clean hands and both the Court below has rightly held that the appellant is not entitled to any relief. Hence, he prayed for dismissal of the appeal. To substantiate his arguments, he relied upon the following decisions:

1. 2008 (3) MLJ 543 (SC) (Nopany Investment (P) Ltd., vs. Santhosh Singh (HUF))
2. AIR 1961 SC 1268 (Mallesappa Bandeppa Desai and another vs., Desai Mallappa alias Mallesappa and another)
3. 2005 (3) LW 627 (P.R.Kannaiyan (died) and 7 others vs. Ramasamy Mandiri and 10 others)

9. Considered the rival submissions made on both sides and also perused the typed set of papers.

10. The genealogy is necessary for the disposal of the case, which is as follows:

Ekambara Naicker = Kanniammal (wife) 3rd defendant/3rd respondent		
----- Thamizhcelvan (son) 1st defendant/ 1st respondent	----- Ramaiah (son) Plaintiff/ Appellant	----- Perumal (son) 2nd defendant/ 2nd respondent

11. It is an admitted fact that the relationship is not disputed. As per the evidence of P.W.1, the first respondent left the village and got employment at Tamil Nadu State Transport Corporation and settled at Chennai. Before the death of his father

since he is suffering from ill-health, the appellant/plaintiff alone taken care of their family. It is appropriate to consider the deposition of P.W.1, wherein in cross examination, he has specifically stated as "From 1985 onwards he is managing the family. Out of the income from 1985, he purchased the property in the names of himself and the 2nd defendant under Ex.B1. Since his mother is not able to cultivate the property, he alone cultivated the property", which shows that he alone managed the property. The property originally belong to one M.V.Krishnamachariar and the plaintiff cultivated the property as a tenant. On 09.03.1987, the Power of Attorney deed has been executed by the said M.V.Krishnamachariar and his sons in favour of the third respondent. P.W.1 himself has admitted that he alone taken steps to execute the Power of Attorney in favour of his mother. It is pertinent to note that Ex.A.11/Power of Attorney has been produced by the appellant/plaintiff alone. The mother/the third respondent has executed the settlement deed in favour of the appellant and the second respondent under Ex.A15 on 16.10.1990, that has been revoked under Ex.B4 on 18.05.1992 and the sale came into effect on 04.12.1992. But after revocation, the mother/the third respondent has executed the sale deed in favour of the respondents 1 and 2 under Ex.A14 and Ex.A13 respectively. P.W.1 himself has admitted that in the power deed the power has been given to the mother for executing a sale and also gift deed. So, it is appropriate to consider the document Ex.A11. On perusal of Ex.A11, it is seen that it was specifically mentioned as "instead of the vendor, the third respondent/third defendant can execute sale deed, lease deed, gift deed, exchange deed in respect of the property". So, she has the right to settle the property in favour of others. In pursuance to that only, she executed the settlement deed in favour of the appellant and the second respondent under Ex.A15. The learned counsel appearing for the respondents would submit that since the entire sale consideration has been paid before execution of power of attorney deed then only the power has been given to settle the property. So, the above argument is acceptable.

12.The only point to be decided is whether Ex.A12/Revocation Deed is true and genuine? The learned counsel appearing for the appellant mainly focusing that no notice is necessary because it is bilateral act. It is also pertinent to note that original settlement deed, Ex.A15 has been produced by the appellant herein. On perusal of the evidence, it is seen that the appellant has taken active part in execution of Power of Attorney deed, Settlement deed and Settlement Revocation deed. Thereafter, the third respondent executed the sale deeds in favour of respondents 1 and 2 since they have difference of opinion with the appellant/plaintiff.

13.Now, whether Ex.A12 has taken place on the date mentioned as 12.06.1990 or after Ex.A13 and Ex.A14 has to be decided? The case of the appellant is that revocation has been done on 12.06.1990. To prove the same, P.W.2/M.V.Krishnamachariar, the owner of the property has been examined, wherein he has fairly conceded that he has not

issued any notice to the Power of Attorney for cancellation of Power deed because the third respondent herself has signed the revocation endorsement in Ex.A12. So, it is a bilateral act and there is no need to send a notice. He has also stated that he has sent a notice to the Registration Department but he has not filed any postal receipt or acknowledgment card. Admittedly in Ex.A13 and Ex.A14, LTI of Kanniammal, who was examined as D.W.1 was found in place. The learned counsel appearing for the appellant mainly focusing that the third respondent, Kanniammal herself signed the settlement deed and now wantonly she put her LTI in Ex.A13 and Ex.A14 instead of signature. By invoking Section 73 of Indian Evidence Act, this Court is empowered to compare the signature in Ex.A12 and Ex.A15. On perusal of Ex.A12 and Ex.A15, it is true that the signature in Ex.A12 and Ex.A15 are similar, but whereas the signature where she signed before the Registrar in Ex.A15 is not tallying with the signature in Ex.A15 and Ex.A12. So, the signature in Ex.A12 is not belonging to the third respondent Kanniammal. So, the arguments advanced by the learned counsel appearing for the appellant that the revocation of Power of Attorney is bilateral act and hence, there is no necessity for sending notice for intimating the revocation does not merit any acceptance. In such circumstances, I am of the view that Ex.A12 is not a bilateral one and the signature in Ex.A12 does not belong to the third respondent. So the revocation of the Power of Attorney has not been intimated to the power holder before she executed the sale deeds. Hence, the Substantial Question of Law Nos.1 and 2 are answered against the appellant.

14.The learned counsel appearing for the appellant relied upon the decision reported in 1999 (1) CTC 245 (Rajiah Nadar vs. Manonmani Ammal), wherein it was held that in the interest of justice, improper appreciation of evidence and glaring misreading of evidence misquoting or failure to consider crucial evidence would warrant interference with not only findings rendered by First Appellate Court but also with concurrent findings of fact. It is appropriate to incorporate paragraph No.25, which reads as follows:

"25.In the background of these facts, perusal of the following judgments rendered by the Supreme Court reveal that there is no justification to construe Section 100 in a very narrow and restricted sense and the recent trend has been in favour of keeping an open eye as against the glaring misreading, misquoting or failure to consider crucial evidence. These judgments will also show that the Supreme Court had not only upheld the interference by the High Court against the findings rendered by the first appellate Court, but also as against the concurrent findings of fact by both the lower Courts on several grounds."

15.There is no quarrel over the proposition. But here P.W.1

himself has admitted that during the lifetime of his father, because of ill health he alone has maintained the family. He further submitted that they have ancestral properties for around 5.75 acres and then purchased 1-1/2 and 1.20 acres and totally there are 8 acres and 3.93 acres having lake irrigation. He has also submitted that 8 acres have not been divided between them and it was in joint patta and the patta stands in the name of his mother, brothers and himself. He would also submitted that they also cultivating poromboke land of 1.20 acres from the year 1988 onwards. After his father's death, the P.W.1/the appellant alone has paid the tax to the property. In his cross examination, he has stated that the first respondent is five years elder than him and he left the Village in the year 1979 after his marriage and since his father was not well, he alone managing the family. So, in the evidence he himself has stated that he alone has managed the joint family property and purchased the property under Ex.B1 in his name and the second respondent's name. Hence, once he has admitted that the property is a joint family property, it is his duty to prove that the sale consideration of Ex.A1 has been paid out of his separate income and not from the joint family income.

16.The learned counsel appearing for the respondents relied upon the decision reported in 2008 (3) MLJ 543 (SC), wherein it was held that a younger member of the joint Hindu family can deal with the joint family property as manager in the following circumstances :

- (i)if the senior member or the Karta is not available;
- (ii)where the Karta relinquishes his right expressly or by necessary implication;
- (iii)in the absence of the manager in exceptional and extra ordinary circumstances such as distress or calamity affecting the whole family and for supporting the family;
- (iv)in the absence of the father:
 - (a)whose whereabouts were not known or
 - (b)who was away in a remote place due to compelling circumstances and his return within a reasonable time was unlikely or not anticipated.

Here, P.W.1 has stated that since the first respondent has got married in the year 1979 and he left the village and his father was not well, he alone taken the management of the family. So, this citation is squarely applicable to the facts of the present case.

17.Further, in the cross examination of P.W.1, he has conceded that he purchased the property under Ex.B1 out of the joint family income in his name and the second respondent's name. But now he has claiming exclusive title to the suit property under Ex.A1 stating that it is his separate property. In such circumstances, it is the duty of the appellant to prove that he purchased the property out of his separate income.

18.The learned counsel appearing for the respondents has also relied upon the decision reported in AIR 1961 SC 1268 (Mallesappa Bandeppa Desai and another vs. Mallappa alias Mallesappa and another), wherein it was held that where a Manager claim any immovable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and it is for him to prove by clear and satisfactory evidence that the property has been purchased out of his own separate funds. It is appropriate to incorporate the relevant portion of paragraph No.15, which reads as follows:

"15.In this connection it is necessary to bear in mind that respondent 1 has not shown by any reliable evidence that the expenses for the said litigation were borne by him out of his pocket. It is true that both the courts have found that respondent 1 purchased certain properties for Rs.600/- in 1925 (Ex.B4). We do not know what the income of the said properties was; obviously it could not be of any significant order; but in our opinion, there is no doubt that where a manager claims that any immovable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase money proceeded from his separate fund. The onus of proof must in such a case be placed on the manager and not on his coparceners."

19.The above said proposition has been followed by the Division Bench of this Court in the decision reported in 2005 (3) LW 627 (P.R.Kannaiyan (died) and 7 others vs. Ramasamy Mandiri and 10 others). It is appropriate to incorporate the relevant paragraphs which reads as follows:

"18.The general rule applicable to presumptions relating to joint family properties have been stated and restated in many decisions. In AIR 1947 Privy Council 189 = 60 L.W.412 (Appalaswami v. Suryanarayanamurthi and Others), it was observed:

"11. ..Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which

the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property...."

33. The fine distinction in such matters seems to have been recognised by a Division Bench of this Court in 2002 (3) MLJ 187 (M. Rangammal and Ors. v. B. Balavenkatesan), wherein it was observed:

"26.... We cannot therefore accept Mr. Srinivasan's arguments as regards the nature of the properties on the ground that there is no evidence with regard to the income from the leasehold property. This proposition goes against the very grain of the concept of Hindu Joint Family. Being the joint family Manager he has certain advantages as well as handicaps. In contradistinction to a property standing in the name of a junior member being treated as his separate acquisition, unless the contrary is proved, in the case of the Kartha it is the other way about and if he has to claim any real estate standing in his name as his own he has to do a lot of explaining how he had not touched the joint family funds for acquiring it, and utilised his own independent means which was always so identifiable, how he had brought it into the common hotchpot and so on and so forth, he or persons claiming under him as his separate property have a tough job ahead."

35. It may be noticed that in the decision of the Supreme Court reported in 2003 (10) SCC 310 (cited supra), the decision reported in AIR 1961 SC 1268 (Cited supra) has been distinguished on facts, but the learned Judges have not disapproved of such decision.

36. In the decisions of the learned single Judge, relied upon by the counsel for the respondents, there is no reference to earlier decision reported in AIR 1977 Madras 171 nor there is any reference to the decision of the Division Bench reported in summary form in 1977 TLNJ 7 (cited supra). Similarly, the decision of the Supreme Court in AIR 1961 SC 1268 seems to have not been noticed. From the decisions of the Supreme Court in AIR 1961 SC 1268, AIR 1977 Madras 171 and also from the observations made by the Allahabad High Court in AIR 1950 Allahabad 54 and in Mayne's Treatise on "Hindu Law & Usage", and all other decisions noticed above, it is apparent that an exception is carved out in the matter relating to

acquisition in the name of Karta, where it is proved that Karta had no independent income and he is in possession of some nucleus and not necessarily sufficient nucleus of the joint family property. In such a case, even where sufficient nucleus is not proved but existence of some nucleus is proved and it is further proved that Karta or Manager, in whose name property had been purchased, had no independent income, the burden is shifted to the Karta to prove that the property has been acquired without the aid of the joint family and with the own separate income of the Karta or the Manager. We hasten to add that such principle is inapplicable, where it is shown that Karta has some separate and independent income, in which event, the normal principle that it is for the person claiming a particular acquisition to the joint family property to prove that there was sufficient surplus from the joint family property from out of which the property in question could have been acquired."

(emphasis supplied)

20. So, the burden is on the appellant to prove that the sale proceeds for Ex.A1 has been out of his own separate income. But he has not let in any evidence to show that Ex.A1 is his separate property. In such circumstances, I am of the view that the appellant herein has not proved that the sale proceeds for Ex.A1 has been given out of own separate income of the appellant.

21. Furthermore, this Court has already in the earlier paragraph has held that before Ex.A1 came into existence, the third respondent has executed a sale deed in favour of respondents 1 and 2 under Ex.A14 and Ex.A13 respectively. In such circumstances, the properties were purchased out of joint family income of the family and so, the appellant is not entitled for declaration of exclusive right over the property. So, both the Court below has rightly held that the appellant is not entitled to declaration of title.

22. It is pertinent to note that the appellant is in possession of the property. The property in possession in respect of the joint family property is concerned, possession of one co-owner deemed to be a possession of another co-owner and hence no injunction can be granted against the other co-owner. So, both the Court below has rightly dismissed the suit. Hence, the decree and judgment passed by both the Court below does not warrant any interference and the same are hereby confirmed. The second appeal is liable to be dismissed and it is hereby dismissed.

23.In fine,

- Second appeal is dismissed with cost.
- The decree and judgment passed by both the Courts below are hereby confirmed.

Sd/-

Assistant Registrar

True Copy

Sub Assistant Registrar

cse

To

1.The Additional District Court
(Fast Track Court II), Kanchipuram.

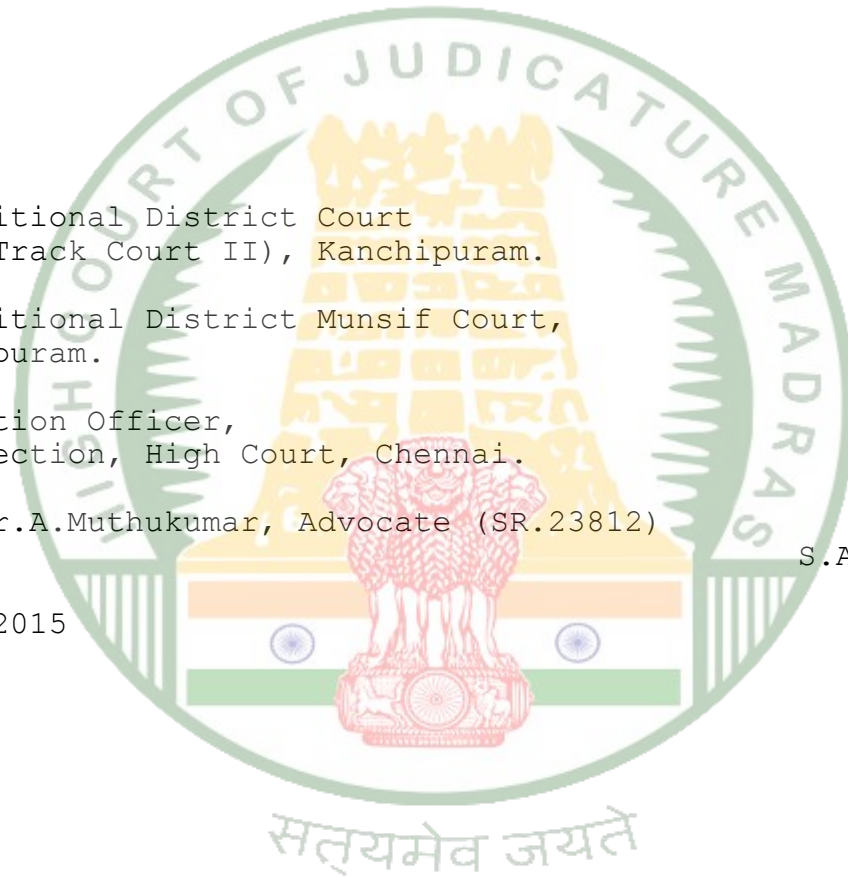
2.The Additional District Munsif Court,
Kanchipuram.

3.The Section Officer,
V.R.Section, High Court, Chennai.

1 cc to Mr.A.Muthukumar, Advocate (SR.23812)

S.A.No.1688 of 2003

jsv(co)
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