

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.02.2015

DATED : 03.03.2015

CORAM

The Hon'ble MR.SANJAY KISHAN KAUL, CHIEF JUSTICE
and
The Hon'ble MR.JUSTICE M.M.SUNDRESH

Letters Patent Appeal No.160 of 2002

1.R.Kothandapani Reddiar
2.G.Vijayakumar Reddiar
3.S.Babu

...Appellants/Appellants

Vs.

1.Kannan
2.Krishnamurthy
3.Gunasekaran
4.Angamuthu (died)
5.Ponnusamy Mudaliar (died)
6.Mayava Padayachi (died)
7.Varadaraja Chettiar
8.Vanathaiya Padayachi (died)
9.Savarimuthu
10.Rajavelu
11.Lourdusamy
12.State Bank of India,
Vridhachalam.
13.Anthoniammal
14.T.Maichael
15.A.Amaldas
16.A.Malliga

...Respondents

Death of R4 and R5 is recorded as
legal representatives are not
necessary for the deceased
R4 and R5 (vide order of Court dated
26.11.2014 made in Memo in S.R.No.10316
of 2014 in L.P.A.No.160 of 2002.

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Death of R6 & R8 is recorded and impleading the L.Rs. of deceased R6 & R8 is dispensed with. (vide order of Court dt.26.11.2014 made in Memo in S.R.No.10315/2014 in LPA.160/2002)

Prayer: Letters Patent Appeal is filed under Clause 15 of the Letters Patent to set aside the judgment and decree dated 13.03.2002 made in A.S.No.450 of 1986 on the file of this Court and allow the same.

For Appellants : Mr.T.S.Baskaran

For Respondents : Mr.K.S.Lakshmikumaran for R1 to R3
M/s Mythili Suresh for R16
R4 to R6 and 8 died

JUDGMENT

M.M.SUNDRESH, J.

The suit properties originally belonged to one A.Rengasamy Reddiar (since deceased). He had four sons, out of whom, two died without issues. The plaintiffs are the grand children of one of the sons of A.Rengasamy Reddiar by name Appu Reddiar. The defendants 2 to 4 of whom the appellants are the legal heirs were the children of another son by name Venkatrayalu Reddiar of A.Rengasamy Reddiar. The respondents 1 to 3 filed the suit in O.S.No.76 of 1974 claiming 3/8th share in respect of various items of the suit properties by also adding their father as a party-defendant.

2. Pending the suit, a release deed (Ex.B.1) was executed on 4.6.1974 by the respective parties viz., the plaintiffs and the defendants, as per which, they had been in enjoyment of the parties by way of exchanges and conveyance. Pursuant thereon, an application was filed by defendants 2 to 4 in I.A.No.85 of 1976 to pass a compromise decree in terms of the release deed - Ex.B.1 dated 4.6.1974. The application was allowed as per the Order dated 1.12.1976 and a compromise was taken on file. In ignorance of Ex.B.1 and the earlier order passed in I.A.No.85 of 1976, a decree for partition was granted by the trial Court on 28.2.1977. Accordingly, a partition was granted in respect of items No.1 to 31, 41 and 42 in the Schedule mentioned in the written statement filed by the defendants. Consequently, the suit was dismissed qua the other items

of the suit properties. The plaintiffs did not choose to challenge the dismissal of the suit with respect to those items.

3. An appeal was laid by defendants 2 to 4 before this Court in A.S.No.1129 of 1977. The primary ground taken in the appeal was the non-consideration of Ex.B.1 - release deed and the order passed in I.A.No.85 of 1976. This Court was pleased to allow the appeal by setting aside the judgment and decree of the trial Court remitting the matter for fresh consideration by taking note of Ex.B.1 - release deed.

4. The following is the operative portion of the judgment rendered in A.S.No.1129 of 1977:

"..... matter is remitted to the learned Subordinate Judge, Chidambaram to consider as to what are all the properties available for partition between the parties, excluding the properties agreed to be enjoyed by the parties under Ex.B-1".

5. On remand, the suit was transferred to Sub-Court, Viruthachalam and renumbered as O.S.No.77 of 1984. Defendants 2 to 4 let in additional documents apart from oral evidence through D.W.11. The affidavit filed in support of I.A.No.85 of 1976 was marked as Ex.C.1. The following paragraphs in the affidavit filed by D.W.11 are apposite:

"...3. On the same day his father Rengasamy Reddiar who was present on that occasion has signed the patta transfer form for R.S.No.17/5 - 0.52 cents in the village of Koonamkurichi. According to the Compromise deed I should get this property. But as Patta stood in the name of 1st Plaintiff's father, his father has signed. I have also signed said transfer form. This Survey Number finds a place in the compromise deed and I have signed.

4. On the same day I have signed the Patta transfer form in the name of 1st Plaintiff for R.S.No.5/5- 0.1 cent out of 0.3 cents (2) R.S.No.40/11 - 0.14 cents out of 0.42 cents in the village of Oomangalam. I have signed the another patta transfer form for R.S.No.177/2 - 01.71 cents, (3) R.S.No.159/2 - 0.22 cents out of 0.35 cents in Koonamkurichi village. 1st Plaintiff signed all the documents. All these survey numbers are found in the documents executed by me in favour of 1,2 and 3 Plaintiffs and which is not before the court.

5. I did not realize the importance of the

documents and therefore I did not mention the same to my lawyer before he cross examined the 1st plaintiff.

6. I am advised that the said document would negative 1st plaintiff version that the compromise deed was obtained from him by means of threat...."

6. In the release deed (Ex.B.1), the properties in possession of parties based upon convenience and cultivation, which had been exchanged earlier, were also included. Apart from the same, for the properties belonged to defendants 2 to 4 including those sold and unsold, the plaintiffs agreed not to have any rights. It is apposite to re-produce the release deed for better appreciation:

"This deed of Release dated 04-06-74 is executed by us,

1. Kannan
2. Krishnamurthy
3. Gunasekaran

all are sons of Rangamy Reddiar residing at Karani Villge, Thirukoilu Taluk

TO AND IN FAVOUR OF

1. Rangamy Reddiar
2. Perumal Reddiar
3. Seetharam Reddiar

all are sons of Venkatarayal Reddiar are residing at U.Maglam, Virudhachalam Taluk.

As per the partition list dated 24-03-1933 Venkatarayal Reddiar, Appu Reddiar and Balakrishna Reddiar divided their properties and were in respective possession and enjoyment of the properties by paying kist for their respective shares.

While so, the cases filed against all of you in O.P.No.39/70 on the file of Sub Court, Chidambaram, C.R.P. No.1448/72 on the file of High Court, Madras stands dismissed on 04-04-74.

The cases were filed and conducted between us at the instigation of the enemies and the cases were all false cases. Therefore in order to avoid disputes in future this Release Deed is executed by us.

In respect to the properties belonging to the three of you including the Properties sold and those remaining unsold, we have no right what so ever over the said properties.

As of today and also earlier we are in enjoyment of properties based on convenience in cultivation and had exchanged some of the properties. These properties are also

included in this release deed.

We three of us hereby release with all our rights in respect of land in S.No.17/5, out of 5 acre 5 cents, your land with an extent of 0.59 cents found in patta standing in your names and S.No.17/5 0.52 cents, found in patta No.199 in the name of our father A.Rengasamy Reddiar in the village of Koolangurichi measuring a total extent of Acre 1.11 within the boundaries - west, north and south of your land and east of Odai and we declare that we have no claim whatsoever over these properties.

The properties sold by our father Rangasamy Reddiar is also included in this release deed...."

7. The issue before the trial Court was identification of the properties covered by Ex.B.1 release deed. The defendants 2 to 4 did not have any objection for granting partition in respect of items 11, 14 to 16, 26, 28 and 29 as per their written statement. Since the 1st defendant has sold the property to the 2nd defendant under Ex.B.2, for items 1 to 3 and 27 mentioned in the written statement, the relief of partition was declined. The suit was decreed in respect of items 4 to 18, 20 to 26 and 28 to 31 mentioned in the written statement of defendants 2 to 4. Once again the plaintiffs did not choose to challenge that part of the decree, which went against them. However, defendants 2 to 4 questioned the decree of the trial Court by filing an appeal before this Court in A.S.No.450 of 1986. The learned single Judge allowed the appeal insofar as items 4 to 18, 20 to 26 and 28 to 31. The appeal was allowed basing reliance upon Ex.B.49, being patta for the fasli 1383 (1973) and Ex.C.1. However, it dismissed the appeal for item Nos.4 and 6 basing reliance upon the evidence of D.W.11. Insofar as item Nos.5, 9, 12 and 13 are concerned, the learned single Judge, basing reliance upon Ex.C.1 - affidavit filed by the 2nd defendant, confirmed the judgment and decree of the trial Court. In respect of Item No.13, the learned single Judge held that prior possession having not been proved, the relief cannot be granted. Now challenging the judgment and decree granted by the learned single Judge, the present appeal has been filed.

8. As defendants 2 to 4 died, the appellants, being the legal heirs of defendants No.2 to 4 have preferred this appeal. A memo was filed by the appellants stating that for item Nos.17 and 18, they do not make any claim. In view of the memo dated 25.11.2014 filed by appellants, the appeal stands dismissed insofar as item Nos.17 and 18.

9. Learned counsel appearing for the appellants submitted that in respect of Items 4 and 6, the learned single Judge has committed

an error on a wrong appreciation of the evidence of D.W.11. The evidence will have to be read as a whole. In fact, the evidence has been given to show the possession of the above said two items. The question of title is irrelevant as what is to be seen is the possession part of it as per Ex.B.1, which states the exchange made between the parties. The findings rendered by the learned single Judge in respect of item Nos.7,8 and 10 would a fortiori apply to item Nos.4 and 6 also, since the said findings have not been challenged by the plaintiffs nor they have been raised any qualm before this Court. Insofar as item Nos.5, 9, 12 and 13 are concerned, the learned single Judge has totally misread Ex.C.1. Ex.C.1 is specific qua the extent mentioned therein, as it deals with the lands belonging to the defendants 2 to 4 in favour of the plaintiffs. There cannot be a decree for the remaining extent, more so, when the content and execution of Ex.C.1 are not in dispute and accepted by the other side. Insofar as Item No.30 is concerned, the entire land acquisition proceedings relates to number of properties and all of them stand in the name of defendants 2 to 4. Therefore, it is for the plaintiffs to show their possession over item No.30. The Courts below have wrongly placed the onus on defendants 2 to 4. Hence the same is also liable to be set aside.

10. Learned counsel appearing for the contesting respondents submitted that the decree of the trial Court has not been filed before this Court. Therefore, this Court can pass a decree insofar as item Nos.5, 9, 12 and 13 are concerned in tune with Ex.C.1. Regarding other items of properties, it is submitted that the two Courts have considered the evidence available on record, both oral and documentary and therefore in the absence of any perversity, they do not call for any interference at this stage.

11. Coming to Item Nos.4 and 6, they stand on the same footing as item Nos.7, 8 and 10. A similar stand has been taken by the appellants for item Nos.4 and 6 on the one hand and Item Nos.7,8 and 10 on the other hand. In all these cases, as per the patta pass book issued under Ex.B.49, the name of Rengasamy Reddiar has been shown. As narrated earlier, Rengasamy Reddiar is defendant No.2. Now, while dealing with Item Nos.7, 8 and 10, the lower Appellate Court has held as follows:

'... These items are found in Ex.B.44, B48 pass books. Ex.B.44 and B48 relate to fasli 1383 which corresponds to 1973. This is prior to Ex.B.1, which is dated 4.6.1974...'

'... It is settled law that patta cannot be a source of title but patta is admissible in evidence to show

enjoyment. It is for the respondents to show Ex.B.44 and B.48 cannot be accepted. These two items are in the names of the appellants 2 and 3, now deceased. The plaintiffs have nothing to say in this regard. So the appellants case is accepted with regard to these item nos. 7,8 and 10.....''

12. However, the case of appellants was rejected basing reliance upon the evidence of D.W.11. What is important is the intention of the parties as deduced under Ex.B.1, which is a release deed between the parties. There is no dispute on the execution and the content of Ex.B.1. This was also approved by the trial Court as well as the learned single Judge. Now, Ex.B.1 says that the properties as enjoyed by the parties will go to their shares. The learned single Judge has applied Ex.B.1 for Item Nos.7, 8 and 10 and rejected it for Item Nos.4 and 6 by going into the title as it stood earlier. This approach is erroneous as the question of title has lost its significance after execution of Ex.B.1.

13. We would like to record certain facts. After the remand made in A.S.No.1129 of 1977, defendants 2 to 4 alone have filed relevant documents apart from going to the box in support of Ex.B.1. It is the 2nd defendant, who deposed as D.W.11. It is he who filed Ex.C.1. In other words, for the reasons known, the plaintiffs did not chose to place their case based upon Ex.B.1. It is defendants 2 to 4, who filed I.A.No.85 of 1976 to pass a compromise decree in terms of release deed dated 4.6.1974. This Order has become final between the parties. Though the trial Court on the earlier occasion did not take this admitted factual position into consideration, the plaintiffs have not chosen to file an appeal against the dismissal of the suit insofar as other items are concerned. Even when a decree was passed subsequently in terms of the Judgment made in A.S.No.1129 of 1977, the plaintiffs have not chosen to file the appeal. The suit was once again decreed only for certain items. The suit decreed for the second time did not cover all the items decreed for the first time. Furthermore, the plaintiffs have once again failed to challenge the judgment and decree rendered by the learned single Judge by which some more items for which a decree was granted by the trial Judge were not included for partition. The plaintiffs have also not chosen to get into the box either in support or against Ex.B.1. As the plaintiffs have not challenged the dismissal of the suit by the learned single Judge insofar as Item Nos.7, 8 and 10 are concerned, the reasoning rendered therein would operate against them. Therefore, on a total analysis of the above factors we are of the view that the decree granted by the Courts below insofar as Item

Nos.4 and 6 of the written statement is liable to be interfered with and accordingly it is set aside.

14. Coming to Item Nos.5, 9, 12 and 13, the learned single Judge proceeded to reject the case of the appellants on the ground that having signed Ex.C.1 and given the properties to the plaintiffs, it is not open to them to contend to the contrary. As rightly submitted by the learned counsel for the appellants, Ex.C.1, though covers item Nos.5, 9, 12 and 13, it deals with specific extent of properties. Ex.C.1 will have to be read in consonance with Ex.B.1. D.W.11 has fairly stated that he has already given his consent for change of patta for specific extents. Ex.C.1 was also accepted by the trial Court as well as the learned single Judge. On the contrary, the plaintiffs have not established title to the remaining extents of lands. Ex.C.1 is an affidavit filed in support of Ex.B.1. Therefore, the consent given under Ex.C.1 cannot be extended to other items of properties. Such construction was totally contrary to law as it goes beyond the admission made in writing under Ex.C.1. Under Ex.C.1, only the following items with the specific extent alone have been given.

'Item 5 - S.No.159/2 measuring 0.22 out of 0.35.
Item 9 - S.No.177/2 measuring 1.71 acres/
Item 12 - S.No.5/5 measuring 0.1 cents out of 0.3 cents
Item 13 - S.No.40/11 measuring 0.14 cents out of 0.42 cents.'

15. In fact, though plaintiffs have sought for a lesser extent in Item No.9 corresponding to Survey No.177/2 and the decree has been granted accordingly, the learned counsel for the appellants fairly submitted that under Ex.C.1, the plaintiffs 2 to 4 are entitled to more extent viz., 1.71 acres. Considering the same, we hold that insofar as Item Nos.5, 9, 12 and 13 are concerned, the plaintiffs are entitled for a decree as per Ex.C.1. Thus, while setting aside the judgment and decree of both the Courts insofar as Items mentioned above, we also set aside the lesser extent granted for Item No.9 (S.No.177/2) measuring 1.71 acres in view of the submission made by the learned counsel for appellants. Accordingly, the decree granted for Item No.9 is modified holding that the plaintiffs are wholly entitled to an extent of 1.71 acres in S.No.177/2.

16. Insofar as Item No.30 is concerned, reliance was made on Ex.B.38 dated 17.5.1979, which is a notice by the Special Thasildar, Land Acquisition, Neyvelli to the 2nd defendant towards the payment of compensation for various items of properties mentioned therein. The notice deals with properties situated in 17 survey numbers. Item

No.30 was shown as a land situated in S.No.276/7 measuring an extent of 0.18.0 cents. The learned single Judge declined to accept the case of the appellants on their failure to prove possession. In this connection, it is to be stated that admittedly under Ex.B.38 defendant No.2 has been shown as the owner/pattadar. It deals with number of properties situated in several survey numbers. As Ex.B.38 is a public document, it is for the plaintiffs to substantiate their case that they are entitled for a decree either based upon title or possession. Unfortunately, the onus has been shifted to prove the possession on the defendants, especially when the document shows the 2nd defendant as the owner/pattadar. It is important to note that for all other items of the properties mentioned in the notice issued by the Land Acquisition Thasildar (Ex.B.38), the case of the plaintiffs was rejected and the suit was dismissed. Therefore, the reasons assigned for those items ought to have been applied to Item No.30 as well, especially when they have become final between the parties leading to the dismissal of the suit.

17. In the result, the appeal stands allowed and judgment and decree granted by the trial Court as confirmed by the learned single Judge insofar as Item Nos.4 and 6 is hereby set aside to the extent indicated above. Accordingly, in respect of Item Nos.5, 9, 12 and 13, the decree granted is modified to the extent covered under Ex.C.1 alone. In that, under Item No.9, the plaintiffs are entitled to 1.71 acres, though a lesser extent was given. Insofar as Item No.30 is concerned, the judgment and decree of the trial Court as confirmed by the learned single Judge is set aside. No costs.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

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Copy to:

The Subordinate Judge,
Vridhachalam

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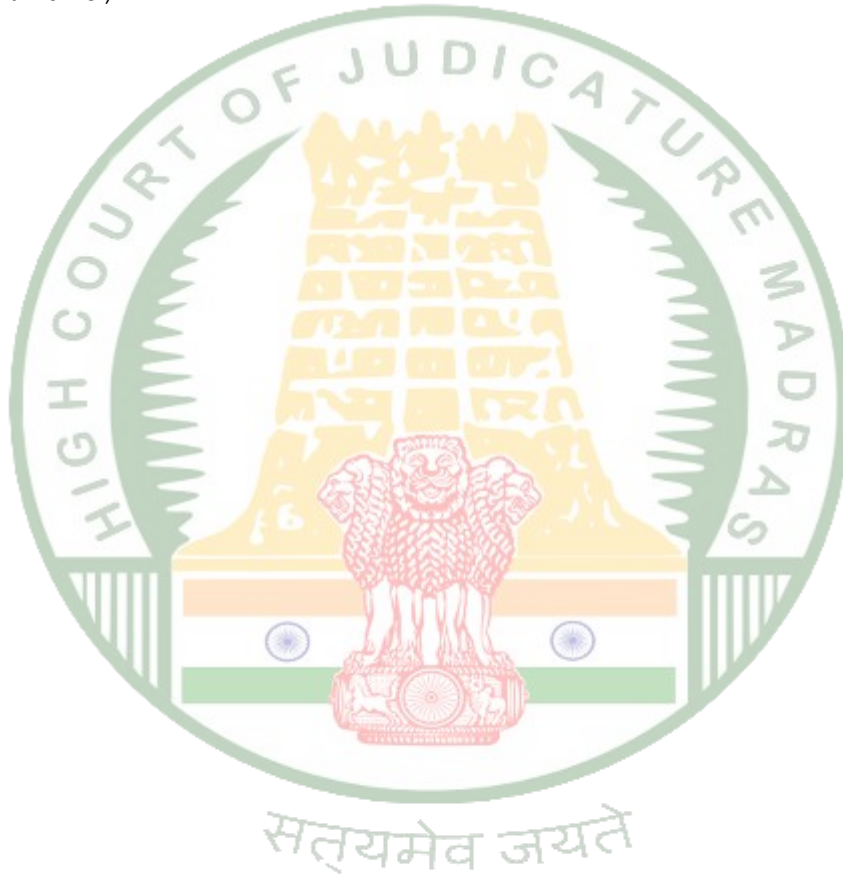
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