



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.06.2015

CORAM

THE HONOURABLE MR.JUSTICE P.R.SHIVAKUMAR

SECOND APPEAL(MD)Nos.330 & 331 of 2015

and

M.P(MD)Nos.2 and 2 of 2015

1.S.A(MD)No.330 of 2015:-

Kadavul @ Subramanian ... Appellant/Appellant/1st Defendant
Vs.

1.Thavamani ... 1st Respondent/1st Respondent/Plaintiff

2.Pitchai

3.Mekala

4.Saminathan

5.Chinnapponnu

6.Prakash @ Arokiam Prakash ... Respondents 2 to 6/Respondents 2 to 6/
Defendants 2 to 5 and 7

Prayer:- Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 against the Judgment and decree dated 21.08.2012 passed in Appeal Suit No.188 of 2011 by the Principal Sub Court, Tiruchirappalli, confirming the Judgment and decree dated 05.07.2011 passed in Original Suit No.80 of 2006 by the Principal District Munsif Court, Tiruchirappalli.

For Appellant : M/s.J.Maria Roseline

2.S.A(MD)No.331 of 2015:-

Kadavul @ Subramanian ... Appellant/Appellant/Plaintiff
Vs.

Thavamani ... Respondent/Respondent/Defendant

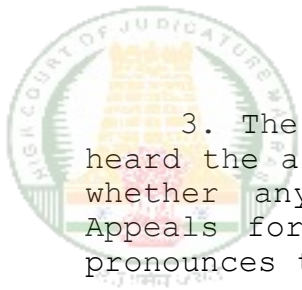
Prayer:- Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 against the Judgment and decree dated 21.08.2012 passed in Appeal Suit No.189 of 2011 by the Principal Sub Court, Tiruchirappalli, confirming the Judgment and decree dated 05.07.2011 passed in Original Suit No.3005 of 2004 by the Principal District Munsif Court, Tiruchirappalli.

For Appellant : M/s.J.Maria Roseline

COMMON JUDGMENT

Notice before admission was directed to be issued to the respondents, but notices sent to the respondents have been returned with an endorsement, 'no such addressee'.

2. These are the Second Appeals filed against the decrees passed in two First Appeals by the lower Appellate Court, confirming the decrees passed in two Original Suits by the trial Court. Both the cases were tried together by the trial Court and were disposed of by a common Judgment. Similarly, the appeals that arose from the decrees passed in both the suits came to be jointly heard and disposed of by a common Judgment by the lower Appellate Court. As against the decrees drawn by the lower Appellate Court on the basis of the common Judgment, the present Second Appeals have been filed.



3. The Second Appeals have not yet been admitted. Hence, this Court heard the arguments of the learned counsel for the appellant to ascertain whether any substantial question of law has arisen in these Second Appeals for determination of this Court. Upon such hearing, this Court pronounces the following common Judgment.

4. The narration of facts in brief will help us to understand the cases and appreciate the issues involved in them.

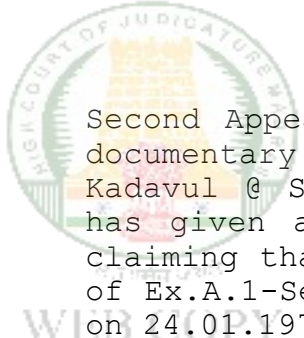
5. Admittedly, the suit property belonged to late Manickam, who died prior to 1950. Late Deivanai Ammal was his wife. After the death of Manickam, she contracted a second marriage and through the second marriage, she got a son by name Kadavul @ Subramanian. He claims to be entitled to the suit property in its entirety on the basis of an alleged settlement deed executed by Deivanai Ammal on 24.01.1976 marked as Ex.A.1.

6. The plaintiff's claim was resisted by Thavamani, who claims to be the grand-daughter of Deivanai Ammal through Kuzhumayee Ammal, the daughter of Deivanai Ammal born through her first husband-Manickam. Kadavul @ Subramanian disputes the contention of Deivanai Ammal that she is the grand-daughter of Manickam and Deivanai Ammal born through their daughter Kuzhumayee Ammal. In fact, Kadavul @ Subramanian contended that Kuzhumayee Ammal was not the daughter of Manickam born through Deivanai Ammal.

7. In the above said background of facts, Kadavul @ Subramanian claims title to the entirety of the suit property. On the other hand, Thavamani claims to be entitled to half share in the suit property and she filed a suit in Original Suit No.80 of 2006 for partition and separate possession. Kadavul @ Subramanian filed the suit in Original Suit No.3005 of 2004 for permanent injunction restraining Thavamani from interfering with his peaceful possession and enjoyment of the suit properties and for costs.

8. The learned trial Judge on an appreciation of evidence, assigning reasons held that the denial made by Kadavul @ Subramanian on the claim of Thavamani to be the grand-daughter of Deivanai Ammal through Kuzhumayee Ammal was totally untenable and unsustainable. In fact, the contention of Kadavul @ Subramanian happened to be that there was no daughter by name Kuzhumayee Ammal for Deivanai Ammal born through her first husband Manickam. The said contention was rejected based on an ancient document, namely Ex.B.1-mortgage deed, executed by Deivanai Ammal for herself and on behalf of her daughter Kuzhumayee Ammal, who was then a minor. Admittedly, Kuzhumayee Ammal is no-more. The said finding based on evidence when challenged before the lower Appellate Court, was confirmed by the lower Appellate Court, concurring with the reasons assigned by the learned trial Judge. The said finding being a finding of fact, which is also supported by evidence cannot be interfered with by the High Court in the Second Appeal, unless such a finding is shown to be a perverse one, in which event, the finding of fact will get promotion as a substantial question of law.

9. As against such un-impeachable documentary evidence produced in <https://hcservices.ecourts.gov.in/hcservices/1>, containing the admission of Deivanai Ammal herself that he had a daughter by name Kuzhumayee Ammal, there is no reliable evidence adduced on the side of Kadavul @ Subramanian (appellant in these



Second Appeals). In fact, he was not able to successfully challenge the documentary evidence adduced by Thavamani. It can even be inferred that Kadavul @ Subramanian, who is the appellant in both the Second Appeals, has given a go-by to the said stand and concentrated his attention on claiming that the suit property in its entirety belonged to him by virtue of Ex.A.1-Settlement deed alleged to have been executed by Deivanai Ammal on 24.01.1976.

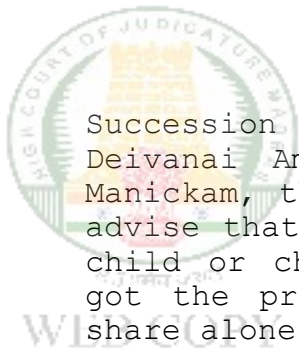
10. Section 68 of the Indian Evidence Act, 1872 contains a stipulation that a document which is required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. The proviso contains an exemption that such a document not being a 'Will' can be used in evidence provided the document is registered in accordance with the provisions of the Indian Registration Act, 1908 notwithstanding that no attesting witness is called for the purpose of proving its execution, unless its execution by the person by whom it purports to have been executed is specifically denied.

11. It is not a case in which the execution of Ex.B.1-Settlement deed is not denied by Thavamani, the opposite party. As such, the mandate provided in Section 68 of the Indian Evidence Act, 1872 has got to be strictly complied with. There is no evidence on the side of the appellant herein, namely Kadavul @ Subramanian, to show that none of the attestors of Ex.A.1, who is subject to process of Court and is capable of giving evidence, is alive.

12. Section 123 of the Transfer of Property Act, 1882 says that a gift of an immovable property must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Though Ex.A.1 is said to have been attested by two witnesses, none of the attestors has been examined to prove its execution and attestation. Hence, as rightly held by the Courts below, Ex.A.1 cannot be used in evidence in proof of the gift Settlement alleged by Kadavul @ Subramanian, the appellant in these Second Appeals. The said finding of the trial Court, which has also been confirmed by the lower Appellate Court, is not defective or infirm, much less perverse.

13. Admittedly, the suit property belonged to one Manickam, who died prior to 1950. It is not in dispute that on the death of Manickam, the property came into the hands of his widow-Deivanai Ammal. As the succession opened before 1956, Deivanai Ammal at that point of time could have got only a limited estate called 'widows estate' without the power of alienation on the advent of the Hindu Succession Act, 1956. By virtue of Section 14 Sub-Section (1), the limited estate of Deivanai Ammal got enlarged into an absolute estate. Admittedly, Deivanai Ammal did not leave any 'Will' providing for succession to her properties. On her death, her son, namely Kadavul @ Subramanian, the appellant in the Second Appeals became a legal heir. Similarly, Thavamani, the daughter of Kuzhumayee Ammal, the pre-deceased daughter of Deivanai Ammal is also a clause-I legal heir as per Section 15 Sub-clause (1)(a) of the Hindu Succession Act, 1956.

<https://hcservices.courts.gov.in/hcservices/>
 Of course, there is a possibility of Thavamani claiming that the property having descended from her grand-father, namely the first husband of Deivanai Ammal, as per Sub-Section (2) of Section 15 of the Hindu



Succession Act, 1956, the property should not go to the other heirs of Deivanai Ammal and she would get in entirety as the legal heir of Manickam, the first husband of Deivanai Ammal. But, perhaps due to proper advise that Sub-Section (2) shall not get attracted in the presence of a child or children, irrespective of the person from whom Deivanai Ammal got the property, Thavamani has chosen to restrict her claim to half share alone.

15. The learned trial Judge and the learned lower Appellate Judge on proper appreciation of facts and on proper application of the statutory provisions and the principles of law, arrived at a correct and concurrent conclusion that Deivanai Ammal became the absolute owner after the enactment of the Hindu Succession Act, 1956 and on her death, the said property left by her devolved equally on Kadavul @ Subramanian and Thavamani with the result that the suit filed by Kadavul @ Subramanian deserved to be dismissed, whereas the suit filed by Thavamani seeking partition deserved to be decreed as prayed for.

16. This Court does not find any defect or infirmity in the above said findings of the Courts below. This Court is also not in a position to find out any valid reason for interference with the decree passed in Original Suit No.3005 of 2004 dismissing the said suit and the preliminary decree passed in O.S.No.80 of 2006 directing division of the suit property into two equal shares and allotment of one such share of Thavamani and also the decrees of the lower Appellate Court confirming the above said decrees passed by the trial Court. No substantial question of law is shown to have arisen in the Second Appeals for the decision of this Court. The questions sought to be projected as substantial questions of law in both the Second Appeals are in fact not substantial questions of law.

17. For all the reasons stated above, this Court comes to the conclusion that both the Second Appeals fail and they are liable to be dismissed at the threshold.

18. Accordingly, the Second Appeal Nos.330 and 331 of 2015 are dismissed. No costs. Consequently, connected Miscellaneous Petitions are dismissed.

Sd/-

Assistant Registrar (T&P)

/True Copy/

Sub Assistant Registrar

To

- 1.The Principal Sub Judge, Tiruchirappalli.
- 2.The Principal District Munsif, Tiruchirappalli.

Ps

SR : 17.08.2015 : 4p/3c

S.A (MD) Nos.330 & 331 of 2015
19.06.2015