

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 03.01.2017

Pronounced on : 10.01.2017

CORAM

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN

Second Appeal No.661 of 1993

& C.M.P.No.7417 of 1993

Ayyakannu

.. Appellant/Respondent/Plaintiff
versus

1. Sellappa Udayar (died)
2. Manickam
3. Tmt.Mani
4. Mahendran
5. Kumar
6. Ravi

(Respondents 3 to 6 are brought
on record as Lrs of the deceased
first Respondent vide order
of the court dated 19.03.2004
made in C.M.P.Nos.4451 to 4453 of 2004)

.. Respondents/
Appellants/Defendants

Second Appeal filed under Section 100 of Civil Procedure Code against the judgement and decree of the District Judge (Principal District Judge), Tiruchirappalli in A.S.No.135 of 1992, dated 30.06.1992, reversing the judgement and decree of the District Munsif Court, Perambalur in O.S.No.157 of 1988, dated 30.10.1990.

For Appellant :Mr.N.Sankaravadivel

For Respondents :Mr.A.Kandasamy for
Mr.R.Singaravelan for R3 to R6
R1 - Died
R2 - No appearance

J U D G E M E N T

The plaintiff is the appellant herein. The suit filed by the appellant for declaration and injunction was allowed by the Trial Court. However, the first Appellate Court reversed the finding of the trial Court. Aggrieved by the reversing judgment, the present appeal is preferred.

2. The parties are described as per their rank and status

shown in the original suit.

3. The brief facts leading to the appeal are as under:-

The case of the plaintiff is that the suit property was purchased by him under auction conducted by the Government under the Revenue Recovery Act, 1890, held on 24.12.1974 for the revenue due of one Ganesan. The property was brought in auction and the plaintiff was the successful bidder. The same was confirmed by the proceedings of the Revenue Authorities and patta was granted in favour of the plaintiff on 06.03.1979. While so, the defendants claimed a right over the suit property and disturbing the possession of the plaintiff since 02.10.1987, hence, the suit for declaration and injunction.

4. The said plea of the plaintiff has been controverted by the defendants on the following lines:-

The plaintiff and defendants are blood brothers. The suit property was purchased in the auction from and out of the income derived from the joint family property. The auction was not confirmed till 1979. In between, there was a partition among the family members on 07.06.1975, wherein the family property was divided among the brothers, who are the parties to the proceedings. The possession and sale deed, in pursuant to the auction in respect of the suit property, were not conveyed. At that point of time, a memorandum of understanding in the name of muchalika was executed by the parties, wherein the plaintiff promised to convey the suit property to the defendants, on 06.03.1979 the auction sale got confirmed and from that day onwards, the defendants are in possession and enjoyment of the properties. Therefore, the suit is liable to be dismissed.

5. Based on the above pleadings, the trial Court framed five issues. The plaintiff examined one witness as PW-1 and marked 10 documents as Exs.A1 to A10 on his side and the defendants examined two witnesses as D.W.1 and D.W.2 and marked 10 documents Exs.B1 to B10. After considering the oral and documentary evidence let in by the respective parties, the trial Court held that the suit property is the absolute property of the plaintiff, who purchased it out of his independent income and the memorandum of understanding between the parties executed on 07.06.1975, which is marked as Ex.B2, is not true and genuine.

6. On appeal, the first appellate Court, re-appreciating the evidence, held that the plaintiff has not proved any independent income of his own to purchase the suit property. The suit property has been purchased by the plaintiff as a Manger of the joint family and therefore, the property should be construed as joint family property. Ex.B2, which was executed on the same day of partition, clearly shows that for want of confirmation of the sale, the suit property was not included in the partition deed and memorandum of understanding by way of muchalika has been executed by the parties. On comparing the signature, it

was found to be the signature of the plaintiff and he could not dispute the genuineness of the document or substantiate his plea through acceptable evidence. For the said reasons, the first appellate court reversed the findings of the trial Court and dismissed the suit.

7. In the above said circumstances, the aggrieved plaintiff has preferred the present appeal. At that time of admission, this Court has formulated the following Substantial Questions of Law for consideration:

(1) Whether the Ex.B2 an unregistered Muchalika is a valid document for the purpose of conveying title when the property has been purchased by the appellant in public auction conducted by the Revenue authorities?

(2) Whether the lower Appellate Court is correct in relying Ex.B2 for holding that the respondents are entitled to the suit property?

8. At the time of arguments, the learned counsel for the appellant/plaintiff submitted that the Court has to consider the following Additional Substantial Questions of Law to arrive at just and proper decision:

(1) Whether the finding of the lower appellate court that appellant/plaintiff acted as "Karthi" when he participated in the public auction is legally sustainable when the father of plaintiff and defendants 1 and 2 was alive at that time and when there is no documentary proof for the same?

(2) Whether the finding of the lower appellate court that the suit property is joint family property is proper sustainable, since Ex.B1, the partition deed does not include the suit property and also Ex.A10 reveals that appellant/plaintiff purchased that house out of his own funds and first defendant as D.W.1 admits that defendants cannot claim any share in the same?

(3) Whether the lower appellate court is justified in shifting the burden of proof of Ex.B2 to the plaintiff when he denies its execution?

(4) Whether the lower appellate court was correct in reversing the well considered of the trial court when Ex.A4 dated 02.02.1988 and adangal stands in the name of appellant?

9. The learned counsel appearing for the appellant submitted that the plaintiff and defendants 1 and 2 are sons of Perumal udayar. The suit schedule property was purchased by the plaintiff in the Court auction held on 24.12.1974. At that time, Perumal udayar was alive and the plaintiff purchased the

property in his individual capacity and not as "Karthan" of the joint family property. The appellate Court failed to appreciate Ex.A10-the sale deed in favour of the plaintiff executed by one Muthusamy teacher. The said sale deed in respect of the residential property is dated on 07.09.1968. This property was not subjected to partition in Ex.B1 because the parties were aware that the property under Ex.A10 was purchased by the plaintiff from and out of his own fund and not from the joint family fund or on behalf of the joint family members. Similarly, the suit property was also purchased from and out of the plaintiff's individual fund and not included in Ex.B1. The alleged Muchalika executed on the same day of partition is an unregistered document and it is forged by the defendants, that is the reason why, when the suit notice was issued to the defendants, they did not reply it.

10. Ex.B2 came to light, only after filing the suit, which throws strong suspicion about its genuineness. If Ex.B1 partition deed and Ex.B2 were executed, on the same day, there is no necessity for the defendants to keep Ex.B2 undisclosed, till filing of the written statement. It is further contended that Ex.B2 being in the nature of conveying right over the immovable property, it ought to have been registered and non registration of the same rendered Ex.B2 inadmissible in evidence.

11. The first appellate court miserably failed to consider the fact that on the day of auction purchase, the 'karthan' of the family, Perumal udayar was alive and when he was the Major and 'karthan' of the joint family the plaintiff cannot be deemed or considered as Karthan being the eldest son of the family when the 'karthan' was is alive, is unknown to Law. It was also contended by the learned counsel for the appellant that Ex.A4 and other kist receipts were not given due consideration by the first appellate court while reversing the well considered judgement of the trial court.

12. Per contra, the learned counsel appearing for the respondents submit that the suit property was purchased in the name of the plaintiff from and out of the joint family income. Though their father was alive at that time, he was 70 years old and he was not physically fit to manage the family property and acted as 'karthan'. Therefore, the plaintiff being the eldest son was managing the property and participated in the auction on behalf of the family and successfully bidded for the suit property. The sale consideration was paid from and out of the joint family income. The patta and the kist receipts relied by the plaintiff are subsequent to the filing of the suit, whereas the documents relied by the defendants clearly proved that the possession of the property is with the defendants and they were in possession and enjoyment of the suit property pursuant to Ex.B2, which is a record of the family arrangement in respect of the suit property.

13. A perusal of the Ex.B1 and B2 indicates that on 07.06.1975, the plaintiff and the defendants have decided to effect partition of the properties available in the family. Accordingly, the property has been divided in three lots and each of them were given one lot under schedule A, B, C respectively. On the same day, an unregistered document has been executed by the plaintiff and the first defendant separately in respect of the suit schedule property, since transfer of the property in favour of the plaintiff has not been effected till that date. In Ex.B2 there is a reference about the execution of partition deed which was registered on the same day. The fact that the auction sale yet to be confirmed in respect of the suit schedule property also find place in Ex.B2. The factum of executing Ex.B2 has been substantiated by D.W.2, as one of the witnesses to the document.

14. Exs. B3 to B7 are kist receipts to the properties from 1978, which is either in the name of plaintiff or in the name of defendants. Ex.B8 the notice from Tamil Nadu Electricity Board addressed to the plaintiff dated 13.12.1978 indicates that the plaintiff has requested electricity service connection to the joint family property as early as 14.03.1972, for which the electricity board has responded, directing the plaintiff to keep ready with pumpsets, motor and other accessories for inspection.

15. This document clinches the issues that though the father of the contesting parties was alive, the plaintiff was managing the property and acting on behalf of the joint family members. Further, though the plaintiff contends that he had income of his own by running grossary shop and he has purchased the property under Ex.A10, it was not questioned by the defendants. However, there is no evidence produced by the plaintiff that he was running a shop and he had enough income from and out of the shop to purchase the suit schedule property. Insofar as Ex.B2 is concerned it has not conveyed any title over the property to any parties and only it say how the property should be dealt once the government confirm the auction sale. Therefore, no registration is required for this document, since there is no conveyance of the property dealt through this document.

16. A bare perusal of the document Ex.B2 would indicate that it is a signed document on both pages and in the last page, the plaintiff has affixed his signature as a kartha and this has been witnessed by two persons. One of them has been examined by the defendants' side as DW.2 and his evidence is unimpeachable. Once the original document is produced and proved through the witness, it is for the defendants to establish whatever contrary he likes to establish. In this case, the plaintiff at the first instance denied the execution of Ex.B2. If it is so, when a document alleged to be signed by him is produced before the Court and statement made by an independent witness about the

execution of the document, the burden to prove the same shifts on the plaintiff. The plaintiff has failed to discharge the said burden of disproving Ex.B2. Therefore, the plaintiff has no ground to sustain the order of the first appellate Court.

17. Insofar as Ex.A4 is concerned, it is kist receipt for the Fasli 1395 to 1397, which is dated 02.02.1988 obviously just before filing the suit on 30.03.1988. It requires no serious imagination to say, these receipts were obtained for the purpose of filing in the suit and not for any other purpose and the kist receipts will not help the plaintiff to show his position. This is a suit for declaration and possession and the plaintiff has not established his possession on the date of filing of the suit. Contrarily the defendants through Ex.B1 and B2 and other documents, have proved that the suit property, which is adjacent to the property allotted to the defendants under Ex.B1, was purchased in the name of the plaintiff, when they were Hindu Undivided Family and on the date of effecting partition, the pendency of confirmation of the sale has been taken note by the parties and they have consciously entered into an agreement by way of Ex.B2. Exs.B3 to B7 are also in favour of the defendants in respect of proving possession at the time of filing the suit.

18. For all the reasons stated above, there is no ground to interfere with the judgement of the first Appellate Court. The questions of law framed for consideration are answered against the appellant. Hence, the Second Appeal is dismissed. Considering the relationship between the parties no order as to costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

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To

- 1.The District Judge (Principal District Judge,
Tiruchirapalli.
- 2.The District Munsif Court,
Perambalur.
- 3.The Section Officer, VR Section, High Court, Madras.

+1cc to M/s.N.Sankaravadivel, Advocate sr.2357

Judgment made in S.A.No.661 of 1993

cnr(co)
ss(14/02/2017)