

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :02.02.2017

PRONOUNCED ON :13.02.2017

CORAM

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

**SECOND APPEAL No.671 of 2007 and
C.M.P.No.8888 of 2016**

1.Subramanian

2.Sambanda Moorthy

3.Ilangovan

4.Dakshinamoorthy

5.Chellappa

6.Arumugam

.. Appellants

/versus/

1.Kalliaperumal

2.M.Shanmugam

3.M.Panjanathan

4.Rajangam

5.N.Ramalingam

.. Respondents

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree of the Principal Subordinate Court, Mayiladuthurai, Nagapattinam District, dated 23.06.1998 passed in A.S.No.115 of 1997 dismissing the appeal, affirming the judgment and

decree of the learned Principal District Munsif, Mayiladuthurai, Nagapattinam District in O.S.No.51 of 1997 dated 17.04.1997.

For Appellants :Ms.G.Sumitra

For Respondents :Mr.A.Muthukar for R2
No appearance for R1
R3 to R5 -dispensed with vide memo.

J U D G M E N T

The second appeal is directed against the concurrent finding of the Courts below dismissing the suit filed for partition.

2. According to the plaintiffs, one Srinivasa Padaiyachi had agricultural land at Movoor village and residential house at Thiruvizhandhur village, South Arcot, Mayavaram Taluk, Tanjavur District. He had three sons by name, Saminathan, Gurunathan and Chellamuthaian. Plaintiffs 1 to 3 are sons of Saminathan and plaintiffs 4 to 7 are children of Gurunathan. The defendants are wife of Chellamuthaian and his children. The plaintiffs contended that Srinivasa Padaiyachi executed a settlement deed, dated 20.09.1985 wherein, he created a trust for deity which, the family was worshiping and made his last son as a Trustee. But, the sons have not carried out the obligation but, they are enjoying the agricultural properties

jointly. Likewise, Chellamuthaian the first defendant is occupying the residential property and enjoying the same. Whiles, the income from the agricultural land is shared by three sons. The first defendant, who is in possession of the residential property, has improved it. But, he refused to partaway the shares of the plaintiffs, when the plaintiffs demanded their shares in the residential rental income, hence, they filed the suit claiming exclusive right over the property. Pending the suit, a compromise was entered between the parties and executed Ex.A1 wherein, the plaintiffs agreed to withdraw the suit and retain the possession of the house property exclusively by paying Rs.4000/- and also relinquishing his right over the agricultural land at Movoor village.

3. Contrarily to this compromise dated 09.11.1979, the first defendant did not withdraw his earlier suit in O.S.No.795 of 1979. Hence, the present suit filed by the plaintiffs seeking $\frac{3}{2}$ share in the suit property. The legal representatives of Chellamuthaian, who arrayed as defendants 2 to 7, after the demise of the first defendant, contested the suit exclusively establishing that the settlement deed of Srinivasa Padaiyachi marked as Ex.A4 is acted upon and properly carried out by Chellamuthaian and his sons, as per wish of Srinivasa Padaiyachi and the

terms found in the settlement deed. The house property is an exclusive possession and enjoyment of the defendants and the other two sons Saminathan and Gurunathan have let out the residential house as early as 1929 and 1941 respectively. They neither contributed for the purpose of Pooja as found in the settlement deed nor residing in the suit property or contributing for the maintenance and payment of tax for the suit property. Therefore, the plaintiffs cannot take any claim or share in the suit property through Saminathan and Gurunathan. On appeal, the first appellate Court also rejected the claim of the plaintiffs. Aggrieved by the concurrent findings of the Courts below, this Second Appeal is preferred.

4. This Court, at the time of admission, before framing any substantial question of law, ordered notice to the respondents to ascertain whether any substantial question of law involved in this appeal. Accordingly, the respondents have entered appearance and opposed the very admission of the appeal.

5. The learned counsel appearing for the appellants submitted that when there is no evidence to show that they acted upon as per the terms of the settlement deed, the Courts below ought not to have relied on the

terms of settlement deed Ex.A4, but should have considered Ex.A1 compromise deed, which is binding force on the respondents.

6. Per contra, the learned counsel appearing for the 2nd respondent submitted that the Courts below only after appreciating the terms of settlement deed marked as Ex.A4 and the oral evidence of D.W.1 has held that Ex.A4 settlement deed has been given effect and acted upon as per the term of the settlement deed and further held that, Ex.A1-compromise deed was not a consensus document. If it is so, the parties could have acted upon it, as per its terms. Admittedly, neither of the party has complied with the terms of the compromise deed-Ex.A1 and therefore, it has no force.

7. A crucial point in this case is that whether the terms of settlement deed acted upon? Ex.A4 is the settlement deed executed by Srinivasa Padaiyachi. The covenant of the document reveals that Chellamuthaian, who is the first defendant in the suit, was given the property to maintain the idols of Sri MahaGanapathy, Palani Aandisamy and Manonmani Amman. From out of the income of the suit property, he should pay the tax and spent for the Pooja and Charity purpose. The

property has been settled upon Chellamuthaian and there upon to the person nominated by him. In case of his failure to nominate the successor, the eldest male descendant shall get the property and he should continue the charity work mentioned in the settlement deed. In so far as the residential property, the settlement deed excludes one room on the western side where the idols are kept and in the rest of the portion, he has permitted all his three sons and his wife to reside. The obligation has been cast upon his sons to carry out repair work jointly and to pay municipal tax jointly and on the demise of the settlor and his wife, the 'Samathegiri' should be carried out from and out of the income in 'A' schedule property. He has entrusted the responsibility of maintaining him and his wife during their old age upon the first defendant viz., Chellamuthaian. He has also restrained his sons from creating any encumbrance upon the suit property. It is also found in the settlement deed an onerous condition that, if his other sons failed to fulfil any of the obligations mentioned in the settlement deed, they have to vacate the house and hand it over to Chellamuthaian.

8. It is an admitted fact that the father of the plaintiffs 1 to 3 left the suit house as early as 1929 and father of plaintiffs 4 to 7 vacated the

house in the year 1949. Till date, the maintenance is carried out by the first defendant and after his demise by the second defendant. Tax is paid by him and enjoyed absolutely by the defendants. It is also proved through evidence that from and out of the income arrived from the agricultural land, the first defendant and after his demise, the second defendant is carrying out the pooja and charity work as found in the settlement deed. Though the appellants plead that they are in joint possession of the suit properties. Except Ex.A1, there is no other document to speak about the possession of the suit property. It is an admitted fact that the terms of the compromise was not acted upon. Further, the first defendant has disputed the very execution of that document. Therefore, even if there was a settlement arrived between the parties, since it was not acted upon, it has no force. The earlier suit in O.S.No.795/79 filed by the first defendant was supposed to be withdrawn in the terms of the panchayat as found in Ex.A1, this never happened. Infact, it is submitted that a decree has been passed in favour of the defendants in the suit.

9. While so, this Court finds no error in the finding of the Courts below and there is no substantial questions of law in this Court to formulate and interfere with the findings of the courts below.

10. For the above said reasons, ***the second appeal is dismissed.*** No order as to costs. Consequently, connected Miscellaneous Petition is also closed.

13.02.2017

Index:Yes/No
Internet:Yes/No
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To

The Principal Subordinate Court, Mayiladuthurai, Nagapattinam District.

The Principal District Munsif Court, Mayiladuthurai, Nagapattinam District.

Dr.G.Jayachandran, J.

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