

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.04.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

S.A.No.33 of 2012

and

M.P.No.1 of 2012

Kolanjimini,
Rep. by Power Agent K.K.Kandasamy

.. Appellant

Vs.

1. Vetriselvi,
Rep. by Power of Attorney, Kalavathi

2. Rayar

3. Sarguna Nadar

4. Panneerselvam

.. Respondents

Second Appeal against the judgment and decree dated 29.02.2008 in A.S.No.92 of 2006 on the file of the Subordinate Court, Chidambaram, against the judgment and decree dated 28.07.2006 in O.S.No.199 of 2003 on the file of the Principal District Munsif Court, Chidambaram.

For appellant : Mr.R.Siddharth for M/s.T.R.Rajaraman

For respondents: Mr.A.Muthukumar for R-1

Notice dispensed with for RR-2 to 4
(vide memo SR.2668 filed on 15.03.2017 and
Court order dated 16.03.2017)

JUDGMENT

The plaintiff is the appellant herein. The appellant/plaintiff sought for declaration of title to the suit properties, apart from seeking the relief of permanent injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the suit properties. The first item of the suit properties is of an extent of 1.58 acres and second item is of an extent of 13-1/2 cents. The appellant/plaintiff was said to have purchased the properties from one Pushpa and her minor daughter Nathiya by two different sale deeds executed in favour of the appellant/plaintiff and the first sale was executed on 05.06.2003 by registered sale deed with regard to item 1 of the suit property and with regard to the second item, the registered sale deed is dated 09.09.2003, both of which are marked as Exs.-A-1 and A-2 respectively. According to the appellant/plaintiff, the first defendant is the second wife of Pakkiri Padayachi and that the marriage was said to have taken place on 12.02.1997 when the first marriage between Pushpa and Pakkiri Padayachi was in existence and she being concubine of Pakkiri Padayachi. It is further contended that the settlement deed is said to have been executed on 17.02.1997 in favour of the first defendant by Pakkiri Padayachi, which according to the plaintiff is wrong. The suit has been filed by the Power of Attorney on behalf of the plaintiff and the suit has been decreed. Aggrieved by the judgment and decree of the trial Court, First Appeal was preferred and the first appellate Court reversed the trial Court's

judgment and decree. According to the appellant/plaintiff, the marriage certificate of Pakkiri Padayachi and vendor has not been produced and that the attesting witness of the sale deeds were not examined. As the appellant/plaintiff did not establish the said marriage and that there was settlement, the relief sought for by the plaintiff could not be granted, and hence, the lower appellate Court reversed the findings of the trial Court. Challenging the same, the plaintiff has come forward with this Second Appeal.

2. It is contended by Mr.R.Siddharth, learned counsel appearing for the appellant/plaintiff that one Sarangapani has earlier filed O.S.No.26 of 1999 with regard to the promissory note, wherein the defendant therein has admitted the marriage between Pakkiri Padayachi and Pushpa. This fact has not been taken note of by the Courts below and when it is admitted in the pleading that though taken in another suit, a contra stand cannot be taken, and there is no need for the plaintiff to prove the marriage. Hence, according to the learned counsel for the appellant/plaintiff, the lower appellate Court ought not to have reversed the findings on that score and shifted the blame on the plaintiff, when the first defendant's stand has not been established based on the contentions made by them. Moreover, the first defendant has not admitted the marriage of Pushpa and Pakkiri Padayachi and the daughter born to them. It is the statement of Sarangapani that Pushpa is the wife of Pakkiri Padayachi and a daughter was born to them.

3. Learned counsel for the appellant/plaintiff further contended that both

the plaintiff and the first defendant are represented by Power of Attorney Agent, but the contention that the plaintiff has not proved the Power of Attorney, may not be correct and that the Power Agent of the first defendant, namely Kalavathi was examined before the Court below to establish that even prior to her being appointed as Power Agent in 2006, as early as in 1997, she was a witness to the settlement deed. Learned counsel made an alternative submission that even assuming for the sake of argument without admitting that the lower appellate Court was right in reversing the judgment of the trial Court, the settlement deed is confined only to one acre and not more than that as mentioned in the settlement deed, even though the relief sought for with regard to first item of the suit property is 1.58 acres near-about. With regard to the second item of the suit property, the first defendant has not claimed any relief. It is submitted that to that extent, his rights have got to be protected and the judgment and decree of the first appellate Court has got to be modified.

4. In reply, learned counsel appearing for the first respondent/first defendant would contend that the lower appellate Court has rightly reversed the findings of the trial Court, as the Power of Attorney has not even been produced and that being the case, the suit itself is not maintainable and the appellant/plaintiff has no locus-standi to maintain the suit. He would further contend that the plaintiff's vendor was not examined and that the marriage between Pakkiri Padayachi and Pushpa was also not proved. He further contended that the plea taken in the other suit, namely in O.S.No.26 of 1999, if

produced before the different Court, the same has got to be established through evidence. Learned counsel for the first defendant drew the attention of this Court to Sections 68 and 69 of the Indian Evidence Act in support of his contentions.

5. Learned counsel for the first respondent also drew the attention of this Court to Section 8 of the Hindu Minority and Guardianship Act and contended that the minor's property cannot be sold, when the plaintiff has admitted that the minor is also one of the owners of the property along with the said Pushpa. The lower appellate Court has held that the first defendant has not made any right or claim with regard to the second item of the suit property. Since the entire relief has been granted in favour of the plaintiff by means of judgment and decree of the trial Court, the first respondent/first defendant has preferred appeal against the judgment of the trial Court, in which, a finding has been rendered by the lower appellate Court in favour of the first defendant.

6. Heard both sides and perused the materials available on record.

7. The following substantial questions of law arise for consideration in this Second Appeal:

- (i) Whether the suit is maintainable in the absence of Power Deed produced before the Court, and
- (ii) Whether the minor's property can be sold ?

8. A legal plea can be taken at any stage of the proceedings and the legal issue can be raised even in the Second Appeal stage in this case that the minor's property cannot be sold without the permission of the Court. Since it is a

disputed question of fact and law and that there is a specific finding by the lower appellate Court that no claim has been made with regard to the second item of the suit property, without rendering a finding on that aspect, this Court leaves the issue open and it is for the parties to agitate the same in accordance with law.

9. With regard to the first item of the suit property, though in the suit schedule, it is mentioned as 1.58 acres near-about, as could be seen from the settlement deed, dated 17.02.1997 Ex.B-1, the total extent of land that has been settled is only 1 acre out of 1.58 acres near-about of the first item. The appellant/plaintiff is not entitled to the relief sought for in item No.1 to the extent mentioned in item No.1, and de-hors 1 acre, which has been settled in favour of the first defendant by Ex.B-1, the plaintiff would be entitled to the relief to the remaining extent out of the extent mentioned in item No.1 of the suit properties.

10. Further, in this case, the first defendant has proved the document Ex.B-1 by examining attesting witnesses to the document. Sections 68 and 69 of the Indian Evidence Act is relied upon on that aspect, which reads as follows:

"Section 68: Proof of execution of document required by law to be attested: If a document is required by law to be attested, it 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:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by

the person by whom it purports to have been executed is specifically denied.

Section 69: Proof where no attesting witness found: If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness atleast is in handwriting, and that the signature of the person executing the document is in the handwriting of that person."

11. As per the provisions of Sections 68 and 69 extracted above, the attesting witness has got to be examined in order to establish the document, and in this case, the first defendant has established the same with regard to Ex.B-1 settlement deed.

12. Though there is much force in the contention of the learned counsel for the appellant/plaintiff that de-hors 1 acre of the land, the plaintiff would be entitled to the relief sought for with regard to the other extent of the suit property in item No.1 and also the second item of the suit property. Since this Court is of the view that the relief sought for by the appellant/plaintiff itself is not maintainable, as the Power Agent has not established that he has got a right to file the suit, the other extent of the land would devolve upon the legal heirs of Pakkiri Padayachi and they can work out their remedy in accordance with law, if so advised.

13. Admittedly, as could be seen from paragraph 26 of the judgment of

the lower appellate Court, the Power of Attorney is unable to say anything as to what transpired with regard to the Power Deed and there is also inconsistent stand taken by the Power Agent who is the plaintiff in the suit. Admittedly, before the first appellate Court, the first defendant has taken a plea that the suit itself cannot be maintained, as there is no Power of Attorney in the eye of law. Admittedly, the Power of Attorney deed has not been produced before the Courts below and the plaintiff has not taken any steps to produce the same before this Court by invoking Order 41 Rule 27 CPC.

14. The contentions raised with regard to the sale of minor's property by relying upon Section 8 of the Hindu Minority and Guardianship Act, is left open as it is a question of fact and law, which has got to be established whether the property really belongs to the minor or not. The minor's property cannot be sold without the prior permission of the Court, and whether it actually belongs to minor or not, is a question of fact and law and it needs to be established in accordance with law and hence, it is left open for the parties to work out their remedy in accordance with law.

15. The substantial questions of law are answered in the above terms. The Second Appeal is accordingly dismissed. No costs. The Miscellaneous Petition is closed.

25.04.2017

Index: Yes/no

Internet: Yes/no

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Copy to

1. The Subordinate Judge, Chidambaram.
2. The Principal District Munsif, Chidambaram.
3. The Section Officer, V.R. Section, High Court, Madras.

S.VAIDYANATHAN, J

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