

In the High Court of Judicature at Madras

Reserved on : 20.12.2016

Pronounced on : 09.01.2017

Coram:

The Honourable Mr. Justice T.RAVINDRAN

Second Appeal No.579 of 2011

and

M.P.No.1 of 2011

T.Chandrasekaran ... Appellant/Plaintiff

Versus

1. Jayalakshmi Ammal (deceased)
2. Rajasekar
3. Chandrasekar
4. Sathiskumar
5. Rajalakshmi
6. Arunsekar
7. Gopal Mudaliar ... Respondents/Defendants 1 & 2, 5, 6, 7, 8

(7th respondent was brought on record as LR of the deceased 1st respondent vide order of the Court dated 28.03.2014 made in M.P.No.1 of 2013)

Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and Decree dated 23.12.2010 made in A.S.No.11 of 2010 on the file of the Subordinate Judge, Ginjee, confirming the judgment and decree dated 23.12.2009 made in O.S.No.150 of 2001 on the file of the Additional District Munsif, Ginjee.

For Appellant .. Mr.S.V.Jayaraman,
Senior Counsel
for
M/s.T.Dhanasekaran

For Respondents.. Mr.V.Ayyadurai

JUDGMENT

Challenge in this Second Appeal is made by the plaintiff against the judgment and decree dated 23.12.2010 made in A.S.No.11 of 2010 on the file of the Subordinate Judge, Ginjee,

confirming the judgment and decree dated 23.12.2009 made in O.S.No.150 of 2001 on the file of the Additional District Munsif Court, Ginjee.

2. The suit has been laid by the plaintiff for declaration and permanent injunction.

3. The Second Appeal has been admitted and the following substantial question of law is formulated for consideration in this Second Appeal :-

"Whether the courts below have rendered a perverse finding that the settlement deed dated 17.06.1992 (17.07.1996) produced as Ex.A2 was not executed with the intention of conferring title on the plaintiff and that the same was not acted upon and given effect to ? "

4. The suit properties belonged to Appavu Mudaliar. The first defendant is the daughter of Appavu Mudaliar. The plaintiff is the brother's son of Appavu Mudaliar. The case of the parties reveal that the suit properties had been acquired by Appavu Mudaliar ancestrally as well as by sale deeds. In any event, it is found that the suit properties are the properties of Appavu Mudaliar. With reference to the above facts, there is no issue between the parties concerned.

5. Now according to the plaintiff, item Nos.1 to 3 of the suit properties had been alienated in his favour by Appavu Mudaliar under the sale deed dated 22.01.1990, which had been marked as Ex.A1. Even though the above case of the plaintiff as regards item Nos.1 to 3 of the suit properties has been disputed by the defendants, it is found that as against the judgment and decree of the trial Court upholding the plaintiff's case in respect of the above said items, the defendants have not preferred any Appeal or Cross Appeal. It could therefore be seen that the plaintiff has been declared to be the owner of item Nos.1 to 3 of the suit properties.

6. In this Second Appeal, we are concerned only with item Nos.4 to 7 of the suit properties. The plaintiff claims title to the above said items under the settlement deed executed in his favour by Appavu Mudaliar on 17.07.1996 and the same has been marked as Ex.A2. Now, according to the plaintiff, the first defendant had been living away from the suit village in her husband's home after her marriage and not taking care of her father Appavu Mudaliar and even the wife of Appavu Mudaliar had left him and living with the first defendant and inasmuch as it is only the plaintiff, who had been taking care of Appavu Mudaliar, out of love and affection, it is pleaded that, Appavu

Mudaliar had settled item Nos. 4 to 7 of the suit properties in his favour under Ex.A2 and thus, he is the owner of the above said items of the suit properties. The above case of the plaintiff is seriously challenged by the defendants and according to the defendants, Ex.A2 had been not executed by Appavu Mudaliar in favour of the plaintiff as projected and on the other hand, Ex.A2 had been fabricated and forged by the plaintiff with the help of his henchmen, taking advantage of the proximity he had been having with Appavu Mudaliar during his old age and therefore, according to the defendants, item Nos.4 to 7 of the suit properties had not been settled in favour of the plaintiff by Appavu Mudaliar and on the other hand, they had been enjoyed by Appavu Mudaliar till his death and therefore, it is contended that Ex.A2 settlement deed has not been given effect to and not been acted upon and on that basis, it is contended that the plaintiff cannot lay a claim over item Nos.4 to 7 of the suit properties.

7. In the light of the above defence put forth by the defendants, it could be seen that the plaintiff has to establish that Ex.A2 settlement deed had been duly executed in his favour by Appavu Mudaliar and that, the same had been accepted by him and the settlement deed had been acted upon and pursuant to the same, it is only the plaintiff, who has been in possession and enjoyment of the suit properties comprised therein. Inasmuch as the defendants have raised a plea that Ex.A2 settlement deed had been fabricated and forged by the plaintiff and not executed by Appavu Mudaliar and the same had been created taking advantage of the old age of Appavu Mudaliar, it has to be seen whether the plaintiff has established that Appavu Mudaliar had executed Ex.A2 settlement deed out of his free will and volition in favour of the plaintiff knowing the effect of the said transaction, it could therefore be seen that to establish Ex.A2, a legal transaction, the plaintiff has to examine at least one of the attestors to the document for proving its authenticity. As per Section 123 of the Transfer of Property Act, a gift of immovable property has to be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Further, as per the definition of the gift under Section 122 of the Transfer of Property Act, the gift should be accepted by or on behalf of the donee and the gift should be made voluntarily and without consideration by the donor. It is found that Appavu Mudaliar had affixed only his Left Thumb Impression (LTI) in Ex.A2 settlement deed. Now according to the defendants, the plaintiff has miserably failed to establish that Appavu Mudaliar had executed Ex.A2 settlement deed as per the legal requirements adumbrated in Section 68 of the Indian Evidence Act and Section 3 of the Transfer of Property Act. As per Section 68 of the Indian Evidence Act, it could be seen that when the settlement deed has been impugned as per the proviso

appended thereto, the document should be established at least by examining one of the attestors to the document.

8. As per Section 3 of the Transfer of Property Act, 'attested' is defined as follows:-

"attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary;

9. It could therefore be seen that for establishing the genuineness of Ex.A2 settlement deed, the plaintiff should establish that the said document had been executed by Appavu Mudaliar in the presence of attestors and that the attestors should have witnessed the execution of the document by Appavu Mudaliar and further, the attestation of the document by the attestors should have been actually witnessed by the executant, viz., Appavu Mudaliar. Now it has to be seen whether the plaintiff has established the legal requirements for proving the authenticity of Ex.A2.

10. The plaintiff has examined the attessor to Ex.A2, Rangasamy, as PW.3. PW.3 in his evidence, during the chief examination, has only stated that Appavu Mudaliar had brought the stamp papers for the settlement deed and handed over the same to the scribe and also after narrating the recitals to be incorporated therein, affixed his LTI in the document. According to him, thereafter he and one Sadayandi had attested the document and thereafter, the document has come to be registered. As rightly put forth by the defendants' counsel, nowhere in the chief examination PW.3 has testified that he or the other attessor Sadayandi had directly witnessed the execution of Ex.A2 by Appavu Mudaliar. Similarly, he has not testified that Appavu Mudaliar had directly witnessed either his

attestation or the attestation of Sadayandi in Ex.A2. It could therefore be seen that the evidence of PW.3 is not in accordance with the definition of the 'attested' as found in Section 3 of the Transfer of Property Act. A cumulative reading of the evidence of PW.3 would go to disclose that he has not disposed anything about having witnessed the execution of the document by Appavu Mudaliar or Appavu Mudaliar having witnessed directly the attestation made by the attestors. In such view of the matter, the courts below have rightly found that the evidence of PW.3 does not satisfy the legal requirements for upholding the validity of Ex.A2 settlement deed. No exception could be taken to the findings of the courts below for coming to the conclusion that the evidence of PW.3 does not satisfy the legal requirements of the proof of execution of Ex.A3 and also the proof of attestation of Ex.A3 as contemplated under Section 68 of the Indian Evidence Act and Section 3 of the Transfer of Property Act.

11. Now it has to be seen whether the plaintiff had accepted the settlement deed alleged to have been executed by Appavu Mudaliar. Item Nos.4 to 7 of the suit properties had been settled in favour of the plaintiff by Appavu Mudaliar under Ex.A2. Under Ex.A1, he had alienated item Nos.1 to 3 of the suit properties. It has not been established by the plaintiff as to why Appavu Mudaliar had chosen to settle item Nos.4 to 7 of the suit properties in favour of the plaintiff and not alienated the same as done in the case of item Nos.1 to 3 of the suit properties under Ex.A1. To the same, the plaintiff would only contend that inasmuch as he had been looking after Appavu Mudaliar during his old age and out of love and affection, Appavu Mudaliar had executed Ex.A2 settlement deed in his favour.

12. If really Ex.A2 had come to be settled in favour of the plaintiff by Appavu Mudaliar, as rightly contended, there is no requirement to make any reference about Ex.A1 transaction in Ex.A2 settlement deed, but strangely recitals pertaining to Ex.A1 sale transaction are also found to be incorporated in Ex.A2. Now admittedly, the first defendant is the only daughter of Appavu Mudaliar. It has not been established or pleaded, as the case may be, that Appavu Mudaliar is inimically disposed of either towards his wife or towards his daughter the first defendant. On the other hand, the plaintiff examined as PW.1, has admitted that there is no enmity between Appavu Mudaliar and his wife. Similarly, PW.3, the attestor has also admitted during the course of cross examination that there is no enmity between Appavu Mudaliar and his daughter, the first defendant and he has further stated that Appavu Mudaliar had given the

proceeds of his properties only to his daughter after meeting out his requirement. It could therefore be seen that when the first defendant is the only daughter of Appavu Mudaliar, it does not stand to reason as to why Appavu Mudaliar should go in for settling the item Nos. 4 to 7 of the suit properties in favour of the plaintiff.

13. Now, it has to be seen whether Appavu Mudaliar had been looked after by the plaintiff, as pleaded. It has been admitted by PW.3 that the landed properties of Appavu Mudaliar are in fact income yielding properties. Further, PW.3 has also admitted that Appavu Mudaliar, during his life time, was himself cultivating his properties and only prior to his death for 2 to 3 months, he had been in sick bed. Similarly, the plaintiff as PW.1 has also during the cross examination admitted that it is only Appavu Mudaliar who had been cultivating his properties till his death and it is true that it is only Appavu Mudaliar who had been in possession and enjoyment of the properties comprised in Exs.A1 and A2. Therefore, from the above evidence adduced on the side of the plaintiff, it could be seen that it is only Appavu Mudaliar, who had been in possession and enjoyment of the properties, particularly comprised in Ex.A2, and not handed over the same to the plaintiff. In other words, it could be seen that Ex.A2 settlement deed has not come to be accepted by the plaintiff or it could be seen that pursuant to Ex.A2, the suit properties had not been settled or handed over to the plaintiff by Appavu Mudaliar and on the other hand, it is only Appavu Mudaliar who had been in possession and enjoyment of the above said items and enjoying the same. Accordingly, it could be seen that Appavu Mudaliar had been giving the proceeds of all the properties to his daughter, the first defendant, after meeting his requirement for his self support. Therefore, the plea of the plaintiff that Ex.A2 settlement deed had come to be executed in his favour in respect of item Nos. 4 to 7 of the properties by Appavu Mudaliar and the same had been acted upon, as such, cannot be accepted in any manner.

14. The other attester to the settlement deed has not been examined. The testimony of the identifying witness Sekar - PW.2 would not in any manner advance the plaintiff's case. PW.2 has only stated that he is one of the identifying witnesses, at the time of registration of Ex.A2 settlement deed. Further, he has also admitted that there is no enmity between Appavu Mudaliar and his wife and he has also admitted that he does not know in whose favour the mutation had been effected after the execution of settlement deed in respect of the suit properties and further admitted that he does not remember the contents of Ex.A2 settlement deed. Such being his deposition, as rightly argued, his evidence would be of no use to sustain the plaintiff's case.

15. It is admitted that Appavu Mudaliar is an illiterate person. Accordingly, it could be seen that he is stated to have subscribed only his Left Thumb Impression (L.T.I) to the document Ex.A2. Admittedly, Appavu Mudaliar was aged 90 years at the time of his death. It could therefore be seen that Appavu Mudaliar could have been in advance stage at the time of alleged execution of settlement deed Ex.A2. It could therefore be seen that Appavu Mudaliar would not have really intended to settle items 4 to 7 of the suit properties in favour of the plaintiff and in such view of the matter, it could be seen that the plaintiff is unable to place acceptable and reliable evidence to prove the genuineness and validity of Ex.A2 in accordance with law, as discussed above. No valid reason has been given by the plaintiff for Appavu Mudaliar to exclude his daughter and settle items 4 to 7 of the suit properties in favour of the plaintiff. Further, it has also not been established that it was only the plaintiff who had been looking after Appavu Mudaliar during his last days. Equally as rightly found by the courts below, for the mere performance of death obsequies of Appavu Mudaliar, the plaintiff would not be entitled to claim title to the suit properties based upon Ex.A2, when it is found that the said document has not been established to be a legal transaction in the eyes of law. That apart, it could be seen that the settlement deed Ex.A2 has not been established to have been accepted and acted upon and given effect to. On the other hand, it is only Appavu Mudaliar, who had been in possession and enjoyment of the suit properties comprised therein till his lifetime and no material is projected by the plaintiff to hold that pursuant to Ex.A2 settlement deed, he had accepted the same and thereafter, enjoying the suit properties comprised therein as full owner thereof.

16. The plaintiff's counsel in support of his case has relied upon the decision reported in 2014 (4) LW 791 (Harbans Pershad Jaiswal (D) by Lrs. ..vs.. Urmila Devi Jaiswal (D) by Lrs.) . However as rightly argued, the above decision is found to be not applicable to the facts and circumstances of the case.

17. In the light of the above discussions, the plaintiff has failed to establish that Appavu Mudaliar had executed the settlement deed dated 17.07.1996 marked as Ex.A2 with an intention of conferring title on the plaintiff and that the same was acted upon and given effect to. The findings of the courts below as regards Ex.A2 are found to be in the right perspective and based on the evidence on record and not found to be erroneous or perverse. Therefore, the substantial question of law formulated in the Second Appeal is answered in favour of the defendants and against the plaintiff.

18. In conclusion, the Second Appeal fails and accordingly, dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

mra

To

1. The Subordinate Judge, Ginjee.
2. The Additional District Munsif, Ginjee.
3. The Section Officer, VR Section, High Court, Madras.

+1cc to Mr.T.Dhanasekaran, Advocate sr.2147

+2cc to Mr.V.Ayyadurai, Advocate Sr.1945

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