

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 08.09.2017

Judgment Pronounced on : 27.09.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.454 of 2006

Kanakasabai ... Appellant/Respondent/Plaintiff

Vs.

1.Perumal Naicker

2.Ranganathan

3.Sekar

4.Ezhumalai

.. R1 to R4 Respondents/Appellants 1 to 4 /  
Defendant 1 to 4

Father's Name of R3 & R4 Amended vide

order of Court dated 08/09/2017

made in CMP No.550/2014 in S.A.454/2006

5.Vijayakuma

..Respondent/2<sup>nd</sup>Respondent/  
5<sup>th</sup> Defendants

This second appeal has been filed under Section 100 of CPC, against the Judgment and Decree dated 30.06.2005 made in A.S.No.17 of 2003 passed by the learned Subordinate Judge, Kancheepuram reversing the Judgment and Decree dated 29.06.2000 in O.S.No.100 of 1999 passed by the learned District Munsiff at Uthiramerur.

For Appellant : Mr.N.Ramanujam

For Respondents : Mr.Ethirajulu for R1 to R4

JUDGMENT

This second appeal arises out of the Judgment and Decree dated 30.06.2005 made in A.S.No.17 of 2003 passed by the learned Subordinate Judge, Kancheepuram reversing the Judgment and Decree dated 29.06.2000 in O.S.No.100 of 1999 passed by the learned District Munsiff at Uthiramerur.

2. Brief facts of the case is as follows:-

According to the plaintiff, the suit properties are the self acquired properties of his father Manicka Naicker. The said Manicka Naicker had only 2 acres of Nanja land in Survey No.7, at Edayampudur Village as his ancestral property. He did not yield any substantial income worth mentioning. Hence, Manicka Naicker did not possess any ancestral income and also did not possess any ancestral nucleus to purchase any property. The said Manicka Naicker had a Soda Factory at Madras. He earned enormous income from the Soda Factory. During second world war, he returned to his native village at Edayampudur. Before such return he purchased lands out of his funds at Edayampudur Village. After his return, from and out of his savings and from and out of the income of the lands, he already purchased and acquired further properties at Edayampudur, Kozhithandalam and Mamanthur Villages at Uthiramerur Taluk. He also dug two wells and installed electrical pumpsets and sheds and obtained electrical service connections in his name at Edayampudur Village. The plaintiff assisted Manicka Naicker and getting income there from. The said lands are cultivated by the plaintiff for the past eight years and more. The said Manicka Naicker, out of affection to the plaintiff, gifted the suit lands already in the enjoyment of the plaintiff under registered settlement deed dated 19.11.1999, since the plaintiff alone have a big family of six daughters and a son. The said gift was accepted by the plaintiff and he is in possession and enjoyment of the same. The defendants 1 and 2 are his brothers and 3 and 4 defendants are sons of the first defendant. The 5<sup>th</sup> defendant is the sister of the plaintiff. They have no manner of right over the suit property. On 20.02.1991, they gave out that they would tress pass over the suit lands, since they aggrieved over the gift of the lands to the plaintiff by the father. Hence, the plaintiff came forward the suit for declaration and injunction.

3. The defendants denied the plaint allegations and stated that the suit properties were purchased from and out of income from the ancestral property of Manicka Naicker. The allegation of running a Soda factory by Manicka Naicker at Madras are all false. The said Maincka Naicker revoked the settlement deed dated 19.09.1990 by another registered deed dated 31.12.1990. The above said settlement deeds were not acted upon. Even though, the said Manicka Naicker settled the property to the plaintiff, he himself cancelled the same since the plaintiff attempt to sell the properties and also failed to maintain his father and mother. Even after the settlement, the possession and enjoyment of the suit properties were with the said Manicka Naicker. Already the plaintiff filed the suit for partition in O.S.No.63 of 1999 and the same was pending and suppressing the same, he came forward the present suit for declaration and injunction with regard to the suit property only on the basis of

cancelled the settlement deed. The plaintiff has not come with the clean hands. Hence, the suit has to be dismissed.

4. After contest, the trial Court decreed the suit as prayed for. Aggrieved upon that the defendants 1 to 4 preferred the appeal before the lower appellate Court and after contest, the lower appellate Court allowed the appeal by reversing the decree and judgment of the trial Court. Now, aggrieved upon that the plaintiff preferred this second appeal.

5. The following substantial question of law were framed by this Court for consideration.

1) Is the lower appellate Court correct in drawing a presumption as to joint family property in respect of the suit properties?

2) Whether the lower appellate Court is correct in not holding that the settlement deed dated 19.11.1990 viz., Ex.A10 is absolute, unconditional and irrevocable?

3) Can there be a presumption as to joint family property when the ancestral property is an un earning asset and when there is no evidence as to income from the nucleus?

6. The learned counsel appearing for the appellant/plaintiff would submit that the settlement deed dated 19.11.1990, namely, Ex.A10 in favour of the plaintiff is absolute, unconditional and irrevocable. There is no recitals with regard to cancellation of the settlement deed for any reason. The specific case of the plaintiff is that the suit properties are self acquired property of his father. To substantiate the same, the plaintiff has produced Ex.A1 to Ex.A8 sale deeds stands in the name of the father of the plaintiff Manicka Naicker. Except the Survey No.7 at Edayampudur Village as his ancestral property and he did not yield any substantial income from that property. For the livelihood, the father of the plaintiff running a Soda Factory and earning lot, out of that said income, he had purchased number of properties in the Village and adjacent Villages also. This is the specific case of the plaintiff. Contrary to that the respondents/defendants alleged that Survey No.7 yielded huge income through that income alone he has purchased number of properties in and around the Edayampudur Village. On the side of the defendants, they have not produced any piece of paper to prove that Survey No.7, yielded any income and from that income, the father of the plaintiff Manicka Naicker purchased the properties in and around the Edayampudur Village. The defendants pleaded joint nucleus they have to prove it. But, mere presumption and assumption is not sufficient to prove that the said Manicka Naicker had

substantial income. The trial Court correctly appreciated the oral and documentary evidences and came to a correct conclusion, but the lower appellate without considering the evidence on record and came to a conclusion only on presumption and assumption that the Manicka Naicker had joint family property and ancestral property and he earned income from that property. Hence, the existence of joint nucleus proved and reverse the findings of the trial Court. It is against law. Further more, once settlement has been executed, it cannot be revoked. Against that provision of law, the first appellate Court relied Ex.B1 and reverse the findings, it is also against Section 126 of the Transfer of Property Act. Therefore, interference of this Court is warranted. Hence, the learned counsel for the appellant prays for allowing this second appeal.

7.The learned counsel appearing for the respondents/defendants would submit that after elaborate discussions of both the oral and documentary evidence adduced by the defendants as Ex.B2 and Ex.B3, the lower appellate Court reverse the findings of the trial Court. Hence, there is no infirmity on the findings of the lower appellate Court. Therefore, there is no chance for interference in the findings of the lower appellate Court. Hence, the learned counsel appearing for the respondents/defendants prays for dismissal of the second appeal.

8.I have heard the rival submissions and also perused the materials available on record.

9.On perusal. According to the plaintiff, his father Manicka Naicker owned landed properties in Survey No.7 at Edayampudur Village as his ancestral properties. The specific contention of the plaintiff is that there is no yielded income from the ancestral property. Hence, his father shifted to Madras and he was running a Soda Factory earned a lot and purchased the properties in Ex.A10 settlement deed itself. The said Manicka Naicker himself reiterated that the settlement mentioned properties are of his self acquired properties. So, he is absolutely entitled to settle in favour of the plaintiff. As such, he executed Ex.A10 settlement deed. But, in contra, according to the defendants, the suit properties were purchased from and out of joint family income and hence he is not entitled to settle in favour of the plaintiff. Put it nutshell, according to the defendants, the settlement properties are ancestral properties. We have to analyse whether Ex.A10 mentioned properties are self acquired property or ancestral property. On the side of the plaintiff, he has produced Ex.A1 to Ex.A8 sale deeds, Ex.A9 Tamil Nadu Electricity Board consumption charge receipts. Ex.A10 is settlement deed. Ex.A11 is survey notice issued to the plaintiff. Ex.A12 Patta stands in the name of father of the plaintiff. Ex.A13 and Ex.A15 are the revenue

receipts issued in the name of plaintiff's father. Ex.A14 Patta Pass book stands in the name of the father of the plaintiff. The above said documents reveals that the father of the plaintiff purchased the suit properties and he was in possession and enjoyment of the same and he settled the same through Ex.A10 settlement deed. But, denying the same, on the side of the defendants, they have produced Ex.B1 cancellation deed. Except Ex.B1, no other documents were produced by the defendants to prove that the suit properties were purchased from and out of ancestral properties income.

10.At this juncture, on the side of the plaintiff, the learned counsel has relied on a ruling reported in 2004 (4) CTC 208 in R.DEIVANAI AMMAL (DIED) AND ANOTHER Vs. MEENAKSHI AMMAL AND OTHERS, wherein it has held as follows:-

"16.....While considering the term 'nucleus' it should always be borne in mind that such nucleus has to be established as a matter of fact and the existence of such nucleus cannot normally be presumed or assumed on probabilities. The extent of the property, the income from the property, the normal liability with which such income would be charged and the net available surplus of such joint family property do all enter into computation for the purpose of assessing the content of the reservoir of such a nucleus from which alone it could, with reasonably certainty, be said that the other joint family properties have been purchased unless a strong link or nexus is established between the available surplus income and the alleged joint family properties. The person who comes to Court with such bare allegations without any substantial proof to back it up should fail."

As per the above Division Bench of this Court, it laid a law that existence of joint nucleus cannot be presume or assume probabilities. In the above said case, it was further held that the defendants claimed properties to be joint family properties and evidence adduced disclosed that plaintiff's father hailed from weavers family and took to profession even in tender years and earned income and on the side of the defendants adduced evidence also corroborated said possession. No evidence adduced to show the existence of joint family nucleus. All properties stood in the name of the father of the plaintiff. Hence, the properties are self acquired properties and not ancestral properties. As per the above citation, the person claiming as joint family must show that extent of the property, the income from the property, the normal liability with which such income

would be charged and the net available surplus of such joint family property from that surplus joint family properties have been purchased unless a strong link and nexus is established between the available surplus income and the alleged joint family properties and the person who comes to Court with such bare allegations without any substantial proof to back it up should fail. In the case on hand, on the side of the defendants, they have not produced any piece of paper to substantiate their claim as either before derived income from the ancestral property and also from and out of surplus income from that ancestral property, he purchased the suit properties. So, without any basis and without any proof, the mere allegation of ancestral property income alone they have purchased is not sufficient. The claim of the defendants are not substantiated by documentary proof. Hence, the defence of joint nucleus is not sustainable. But, the plaintiff has produced number of documents in which, the father of the plaintiff himself stated that the suit properties are self acquired properties. He is the fit person to speak about the truth. Hence, the claim of the plaintiff is tenable. Therefore, the father of the plaintiff is absolutely entitled to execute Ex.A10 settlement deed in favour of the plaintiff. But, the first appellate Court without considering the settled legal position, only on assumption and presumption came to a conclusion that the suit properties were purchased from and out of joint family income. The said defence is not sustainable and also it is against the law.

11.The next defence put forth by the defendants side is that the father of the plaintiff Manicka Naicker himself cancelled Ex.A10. So, the plaintiff cannot claim declaratory relief. On the side of the plaintiff, the learned counsel has relied on two citations in this aspect. As the settlor has no right to revoke the settlement deed Ex.A10, the learned counsel relied on a ruling reported in 2009 (5) CTC 558 in S.GANESAN Vs.BHARATHIRAJAN, wherein it has held as follows:-

"7.....The settlement deed being a registered settlement deed and irrevocable there is no power vested with the said Balu to revoke the same under Ex.A57. Therefore, the Court below has rightly held that the unilateral cancellation of the settlement deed by the said Balu is void since he did not have the title to the suit property. The trial Court has also referred with the Specific Clause in the settlement deed. In pursuant to the settlement deed the defendant has purchased the suit property under Ex.B5 dated 02.09.1992 which is registered sale deed. Therefore, it is clear notwithstanding the

fact that the possession has not been handed over to donee under a settlement the same would not invalid the transaction. Similarly under Section 127 of the Transfer of Property Act, 1882 a minor is competent to accept a gift."

In the above said ruling on relying the Apex Court verdict which is reported in 2004 (1) CTC 146 in K.BALAKRISHNAN Vs. K.KAMALAM AND OTHERS case, it was decided that even after settlement, possession was not handed over to donee by donor and on that ground alone the settlement deed cannot be unilaterally cancelled. In support of his contention, the learned counsel for the plaintiff/appellant relied on ruling reported in 2014 (3) CTC 113 in V.D.LOGANATHAN Vs.THE SUB-REGISTRAR, OFFICE OF THE SUB-REGISTRAR, PALLAVARAM, CHENNAI-600 044 AND ANOTHER, wherein it has held as follows:-

"6.In fact the registration of cancellation of the Settlement Deed is against the Public Policy as it was not open to the Sub-Registrar to register the cancellation of the Deed, when the Settlement Deed is unconditional and irrevocable. If at all the party who has executed the document is aggrieved by the settlement Deed, he could have very well approached the Civil Court to set it aside, but certainly could not unilaterally cancel it, by getting the Deed of Cancellation registered with the Sub Registrar. The Cancellation Deed and its registration, therefore, being without jurisdiction, is liable to be set aside."

As per the said ruling, the Court has cancelled the revocation deed of settlement by quashing that document.

12.Now let us see whether the law permits the father of the plaintiff to cancel the settlement deed have to be analysed. The relevant provision of Section 126(1) of the Transfer of Property Act is runs as follows:-

"126. When gift may be suspended or revoked.—The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice."

#### Illustrations

(a) A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(b) A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds goods as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

As per the above Section 126 of the Transfer of Property Act, the donor cannot revoke the gift settlement without reservation for cancellation. In this aspect, number of citations of this Court pronounced by this Court. A gift deed once validly made cannot be revoked at the mere Will of the donor. Once a gift has accepted and in the absence of power of revocation, the settlement cannot be revoked as provided under Section 126 of the Transfer of Property Act. Once the settlement deed is accepted by the settlee the settlement is completed. In the absence of power of revocation reserved for the settlor, the gift deed cannot be revoked. It is permissible for the Court to brought the presumption of acceptance from the conduct of the parties and from the factual materials. The physical delivery of the property gifted is not contemplated and what is contemplated is the acceptance by the donee or on behalf of the donee. In this case, the plaintiff accepted Ex.A10 settlement deed and acted upon the same is proved through Ex.A16 to Ex.A21. As such, the plaintiff having accepted the gift, the settlor cannot unilaterally cancel the same. The registered gift deed cannot be unilaterally cancelled by another registered deed and the only remedy is to file a suit seeking cancellation of the gift deed. In view of the above said legal position, the father of the plaintiff has no right to cancel the Ex.A10 sale deed through Ex.B1 revocation deed unilaterally and his remedy only through filing a separate suit for cancellation.

13.Now, let us see the next ground adduced by the lower appellate Court for reversing the trial Court Judgment and Decree. Additional evidence was produced by the defendant in

the lower appellate Court as Ex.B2 and Ex.B3. Ex.B2 is the partition suit filed by the plaintiff herein in O.S.No.63 of 1999 for partition. The same is pending. Hence, the plaintiff suppressed the materials facts and has not come with the clean hands. As per the version of the lower appellate Court, regarding Ex.B2, D.W.1 has admitted that “தாவா வழக்கு தவிர பாகப்பிரிவினை கேட்டு செங்கல்பட்டு உரிமையியல் நீதிமன்றத்தில் வழக்கு தாக்கல் செய்து மேற்படி வழக்கு இந்நீதிமன்றத்திற்கு மாற்றப்பட்டுள்ளது. அந்த வழக்கின் எண் அ.வ.எண்.63/99. அந்த வழக்கில் thjp jhth brhj;ij nrh;f;ftpy;iy/” From the evidence of D.W.1, it is crystal clear that the suit properties not find place in the partition suit in O.S.No.63/99, it is an admission by the second defendant himself. So, the plaintiff filed the suit for declaration and injunction with regard to his property settled by his father in his favour. The partition suit in O.S.No.63 of 1999 filed by the plaintiff with regard to other properties for partition. Both the properties are self acquired properties of the father of the plaintiff. The suit property alone settled in favour of the plaintiff through Ex.A.10. So, he filed the suit originally in the year 1991 itself. In the above said suit originally filed before the Sub Court, Chengalpattu on 22.02.1991 as O.S.No.24 of 1991. Subsequently, it was transferred to this Court as per the order of the Principal District Judge, Chengalpattu in order No.7048/1999 dated 12.08.1999 and numbered as O.S.No.100 of 1999 before the District Musif Court, Uthiramerur. The partition suit filed in the year,1999 by the plaintiff with regard to the other properties and not with regard to this suit property. Hence, Ex.B2 is no way relevant to deny the rights of the plaintiff. Therefore, the reason adduced by the lower appellate Court on relying Ex.B2 and Ex.B3 to reverse the finding of the trial Court is not sustainable. As per the following verdict of this Court reported in 1999 (1) CTC 245 in RAJIAH NADAR Vs. MANONMANI AMMAL, wherein it has held as follows:-

“23.....As such the Supreme Court as well as the various High Courts have always been alive to the situation that in the interest of justice it would be necessary not to ignore improper appreciation of evidence or to turn a blind eye to glaring mis-reading of the evidence by the Subordinate Courts. In fact in the very judgments relied upon by the learned counsel for the respondent such as reported in Ramachandra v. Ramalinga, A.I.R. 1963 S.C. 302 and Navaneethammal v. Arjuna Chetty, 1996 (6) SCC 166 it has been held that if a finding of fact had been recorded by the appellate Court without any evidence then such a finding can be successfully challenged in Second Appeal and if there were circumstances

of compelling reasons warranting such interference. Therefore, the fact remains that a question of fact is not a taboo for Section 100 C.P.C. It is also well settled that an appellate Court cannot interfere and set aside the findings of the trial Court which had the advantage of watching the demeanour of the witness, unless there are very strong and compelling reasons to reverse the judgment."

The above said ruling on relying the Supreme Court verdict what are the circumstances, the High Court can interfere with the findings of the first appellate Court. In this case, the trial Court upheld the claim of the plaintiff on the basis of the available evidence on record, but the lower appellate Court without appreciation of available evidence properly, came to the conclusion on the basis of assumption and presumption and also relied Ex.B2, which is no way related with the suit properties. Hence, interference of this Court is warranted since the findings of the lower appellate Court is contrary to the provision under Section 126 of the Transfer of Property Act. Therefore, this Court comes to a conclusion that the substantial question of law raised by the appellant is sustainable and the same is answered in favour of the plaintiff.

14. In the result, the second appeal is allowed. No costs. The Judgment and Decree dated 30.06.2005 made in A.S.No.17 of 2003 passed by the learned Subordinate Judge, Kancheepuram is hereby set aside and the Judgment and Decree dated 29.06.2000 in O.S.No.100 of 1999 passed by the learned District Munsiff, Uthiramerur is restored.

Sd/-  
Assistant Registrar (CS-VI)

//True copy//

Sub Assistant Registrar

rrg  
To

1. The Sub Judge, Kancheepuram.
2. The District Munsif, Uthiramerur.

Copy To: The Section Officer, VR Section, High Court, Madras.

+2cc to Mr.N.Ramanujam, Advocate SR.No.67221

S.A.No.454 of 2006

RJI (CO)  
GMY (31/12/2018)