

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 19-11-2018

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

Second Appeal No.1312 of 2005

Prithivirajan

(Sole appellant declared as Major and his father and next friend Gunasekaran discharged from Guardianship vide Court order dated 19.11.2018 made in CMP Nos.588 and 589 of 2010) ... Appellant /Plaintiff

...Vs...

1.Tholkappiyan ... 1<sup>st</sup> Respondent/1<sup>st</sup> Defendant  
2.Subramanian

(Second Defendant/Second Respondent was set ex parte before the lower Appellate Court and died on 31.12.2004) ... Respondents

Second Appeal is preferred under Section 100 of the Code of Civil Procedure, against the judgment and decree passed in A.S.No.32 of 2003 on the file of the Principal Sub Court, Virudhachalam dated 29.10.2004, confirming the judgment and decree passed in O.S.No.960 of 1991 dated 27.2.2002 on the file of the Principal District Munsif Court, Virudhachalam.

For Appellant : Mr.A.G.Rajan for  
Mr.K.Kuppusamy

For Respondent-1 : Mr.V.Ayyadurai,  
Senior Counsel for  
Mr.V.B.Perumal Raj.

For Respondent-2 : Died

J U D G M E N T

The Second Appeal on hand is preferred against the judgment and decree passed by the Trial Court in O.S.No.960 of 1991 as well as by the First Appellate Court in A.S.No.32 of 2003.

2. The ranking of the parties are referred as per the ranking assigned before the Trial Court.

3. The facts in nutshell to be considered with reference to the pleadings of the plaintiff and the defendants are that the suit was filed for declaration of title and for permanent injunction. The plaintiff, originally at the time of institution of the suit, was a minor represented by the natural guardian father and the first defendant is the son of the second defendant, so also the father of the minor plaintiff.

4. The second defendant, who is none other than the grandfather of the plaintiff, executed a Settlement Deed in favour of the plaintiff on 19.6.1991. Pursuant to the Settlement, the plaintiff claims that he was in possession and enjoyment of the properties settled in his name. It was contended that the Settlement executed by the second defendant/grandfather was cancelled by him in Ex.A-2. Ex.A-1 is the Settlement Deed and Ex.A-2 is the Cancellation Deed. Questioning the actions of the second defendant, the plaintiff was constrained to file the suit on the ground that the Settlement Deed executed and the title transferred in the name of the plaintiff can never be taken away by way of a Cancellation Deed. So the Settlement Deed was illegally executed by the second defendant, who is none other than the grandfather of the plaintiff.

5. The first defendant contested the suit mainly on the ground that the second defendant has no authority or locus standi to execute the Settlement Deed in favour of the plaintiff. The suit schedule property was purchased from and out of the sale proceeds of the Joint Family Property as well as the personal income of the first defendant. In other words, the sale consideration for the purchase of the suit schedule properties were made from and out of the personal income of the first defendant as well as from and out of the sale proceeds of the Joint Family Property belongs to the plaintiff and the defendants. Such being the factum, the unilateral execution of the Settlement Deed by the second defendant in favour of the plaintiff is certainly null and void and therefore, the Cancellation Deed executed by the second defendant was done in order to cure the illegalities committed by the second defendant by executing the Settlement Deed in favour of the plaintiff.

6. The learned Senior Counsel, appearing on behalf of the first defendant, also urged this Court by stating that the very issue in relation to Section 101 of the Evidence Act, was also dealt with by the Trial Court and a conclusion was arrived on the ground that the person, who approaches the Court must establish his case under the provisions of the Evidence Act and

therefore, the very question of law now raised before this Court was considered by the Trial Court with substantial reasonings and accordingly, the question of law raised is to be rejected.

7. It is further contended that the plaintiff had not established that the properties settled by the second defendant was from and out of his own earnings. The plaintiff had failed to establish that the second defendant is capable of executing a Settlement Deed in respect of the suit schedule properties purchased from and out of the sale proceeds of the Joint Family Properties as well as the personal income of the first defendant. In the absence of establishing the right of the second defendant to execute the Settlement Deed in favour of the plaintiff, the Cancellation Deed is to be construed as a valid document in view of the fact that the Trial Court adjudicated all these facts on merits and arrived a conclusion that the plaintiff had not established his case by filing necessary documents and by adducing evidences with reference to the Evidence Act.

8. The Trial Court formulated the issues by stating that whether plaintiff is entitled for the relief, as such, sought for in the suit. The findings of the Trial Court is unambiguous that any person who claims that a particular property is a Joint Family Property, then the said person alone is bound to establish the fact that the said property is a Joint Family Property. In other words, the burden of proof lies on the person, who claims that a particular property is a Joint Family Property.

9. The contention of the plaintiff is that the second defendant purchased the property from and out of his own income, was not established before the Trial Court. It was contended by the plaintiff that the second defendant worked as an Umbrella Repairer and earned money and purchased the property. However, these facts were not established by producing documents or by adducing acceptable evidences. In the absence of establishing the fact that the suit schedule property was purchased from and out of the income of the second defendant, then the relief, as such, sought for in the plaint, cannot be granted at all.

10. The Trial Court further adjudicated the issues with reference to the documents marked by the respective parties and arrived a conclusion that the Settlement Deed was improper and the second defendant had no locus standi to execute a Settlement Deed in favour of the plaintiff in view of the fact that the first defendant had established that the suit schedule property was purchased from and out of the sale proceeds of the Joint Family Property as well as from and out of his income earned by the first defendant. It was established that the first

defendant was a Government employee and the second defendant was an Umbrella Repairer. Thus, there is a reason to believe in respect of the findings arrived by the Trial Court in this regard.

11. This apart, the first defendant established that he was a Government Servant and therefore, the Trial Court found that the Settlement Deed executed by the second defendant in favour of the plaintiff was improper and the second defendant had no locus standi to execute the Settlement Deed in respect of the suit schedule property. Thus, the Cancellation Deed executed was proper and in view of the fact that the second defendant himself executed the Cancellation Deed, the Trial Court come to the conclusion that the plaintiff is not entitled for any relief, as such, sought for in the plaint.

12. The First Appellate Court also considered the facts presented by the respective parties to the suit and formulated the issues that whether the suit schedule property was purchased from and out of the self earned money of the second defendant or not ? Whether the Settlement Deed dated 19.6.1991 is a valid Settlement or not ? Whether the Cancellation of Settlement Deed dated 26.6.2001 is a valid document or not ? Further, the First Appellate Court adjudicated the issue in relation to the fact that whether the suit schedule property was purchased from and out of the sale proceeds of the Joint Family Property.

13. The First Appellate Court also independently adjudicated all the issues put forth by the respective parties, both before the Trial Court as well as before the First Appellate Court. The categorical finding in this regard was made by the First Appellate Court in paragraph 18 of the judgment that the second defendant is incompetent to execute the Settlement Deed in favour of the plaintiff. The plaintiff is the grandson of the second defendant. The suit schedule property was purchased from and out of the sale proceeds of the Joint Family Property as well as the self earned money of the first defendant. Further, the first defendant had established before the Trial Court that beyond his salary as a Government employee, he borrowed loan for the purpose of purchasing the suit schedule property and discharged the loan amount. The very fact that he borrowed the loan and discharged the said loan will establish that the suit schedule property purchased from and out of the earnings of the first defendant and further from and out of the sale proceeds of the Joint Family Property. Therefore, the Cancellation of Settlement Deed executed by the second defendant cancelling the original Settlement Deed was proper and there is no illegality in respect of such cancellation.

14. On examination of the witnesses, the deposition of the witnesses established that the suit schedule property was not purchased from and out of the self earned money of the second defendant. When the second defendant had no source of income to purchase the suit schedule property, the Trial Court as well as the First Appellate Court arrived a conclusion that the very contention of the plaintiff that the suit schedule property was purchased from and out of the self earned money of the second defendant is incorrect.

15. The present Second Appeal was admitted on the following questions of law:-

"(1) Whether the first defendant had discharged the burden set out in Section 101 of the Indian Evidence Act to prove that the suit properties are the joint family properties ?

(2) Whether the Courts below were right in holding that the suit properties are the joint family properties in the absence of any material to establish the same ?

(3) Whether the findings of the Courts below namely, the suit properties are the joint family properties, satisfy the guidelines set out in the decision reported in 2004 (4) CTC page 208 ?"

16. In respect of the first question of law, the learned Senior Counsel, appearing on behalf of the first defendant, contended that the first question of law was decided even by the Trial Court with reference to the facts established by the respective parties in the suit. The Trial Court itself found that the person, who claims a particular property as a Joint Family Property, then the burden of proof lies on him to establish the factum. The burden of proof falls on the plaintiff at the first instance in the present Second Appeal. Thus, the Trial Court concluded that the plaintiff had failed to establish the factum regarding the Joint Family Property as the self acquired property of the second defendant, then he is not entitled for any relief, as such, sought for in the suit.

17. The learned counsel for the appellant disputed the said point by stating that the Settlement Deed executed was proper and there is no infirmity. The property described in the suit was originally purchased in the name of the second defendant. When the property stands in the name of the second defendant, he has got every right to execute the Settlement Deed in favour of any person. Such being the factum, the present Second appeal deserves to be considered.

18. The second question of law is raised whether the Courts below were right in holding that the suit properties are the Joint Family Properties in the absence of any material to establish the same. In respect of the second question of law, this Court is of an opinion that the plaintiff, at the first instance, had not established that the suit schedule property was purchased from and out of the income of the second defendant. When the suit schedule properties were not purchased from and out of the income of the second defendant in his name, then an inference to be drawn. Even in the absence of any evidence that the suit schedule property was purchased either from and out of the sale proceeds of the Joint Family Property or from and out of the income of the sons of the second defendant.

19. Though it is not clear whether the father of the original minor plaintiff also contributed for the purchase of the suit schedule property, these facts were not adjudicated. However, the plaintiff had failed to establish that the suit schedule property was purchased from and out of the self earned money of the second defendant. Thus, this Court cannot come to a conclusion that the property in question was purchased by the second defendant in his name only from his self earned money. But in the absence of the fact that the suit schedule property was purchased by the second defendant in his name from and out of the self earned money, this Court is of an opinion that the findings of the Trial Court as well as the First Appellate Court are to be accepted.

20. The third question of law is raised with reference to the judgment reported in 2004 4 CTC 208 [R. Deivanai Ammal (Died) and another Vs. G. Meenakshi Ammal and Others]. However, the facts and circumstances narrated in the judgment cited above, are not akin to that of the facts and circumstances prevailing in the present Second Appeal on hand. Thus, the abovesaid judgment cannot be relied upon for the purpose of assailing the judgment and decree delivered by the Trial Court as well as by the First Appellate Court.

21. In any angle, this Court could able to find that the Trial Court had adjudicated all the relevant issues and the burden of proof in respect of the suit schedule property purchased by the second defendant and also the locus standi of the second defendant in respect of the execution of the Settlement Deed as well as the consequential cancellation of Settlement Deed executed. All these factual aspects were considered by the Trial Court as well as by the First Appellate Court and the findings were arrived with reference to the provisions of the Evidence Act and there is no perversity or illegality or infirmity in respect of the judgment and decree by

the Trial Court as well as by the First Appellate Court.

22. This apart, certain disputed facts by the parties, which were concluded both by the Trial Court as well as by the First Appellate Court, cannot be reopened in a Second Appeal, unless it is established that such recording of facts is perverse and not in accord with the original pleadings. In the absence of any such perversity or infirmity in the factual recording of concluded facts concurrently by both the Courts have to be accepted in a Second Appeal as the scope of the Second Appeal under Section 100 of the Code of Civil Procedure is undoubtedly limited and this Court has to exercise the power of adjudication under Section 100 of the Code of Civil Procedure only with reference to the question of law raised and the perversity, if any noticed in respect of the judgment and decree of the Subordinate Courts.

23. This being the legal principles to be followed, this Court do not find any illegality or infirmity or perversity in respect of the findings made by the Trial Court as well as by the First Appellate Court with reference to the facts and circumstances involved in the present Second Appeal. Accordingly, the judgment and decree passed in A.S.No.32 of 2003 on the file of the Principal Sub Court, Virudhachalam dated 29.10.2004 and the judgment and decree passed in O.S.No.960 of 1991 dated 27.2.2002 on the file of the Principal District Munsif Court, Virudhachalam, stand confirmed and consequently, the Second Appeal stands dismissed. However, there shall be no order as to costs.

Sd/-  
Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

Svn

To

- 1.The Principal Sub Judge,  
Principal Sub Court,  
Virudhachalam.
- 2.The Principal District Munsif,  
Principal District Munsif Court,  
Virudhachalam.

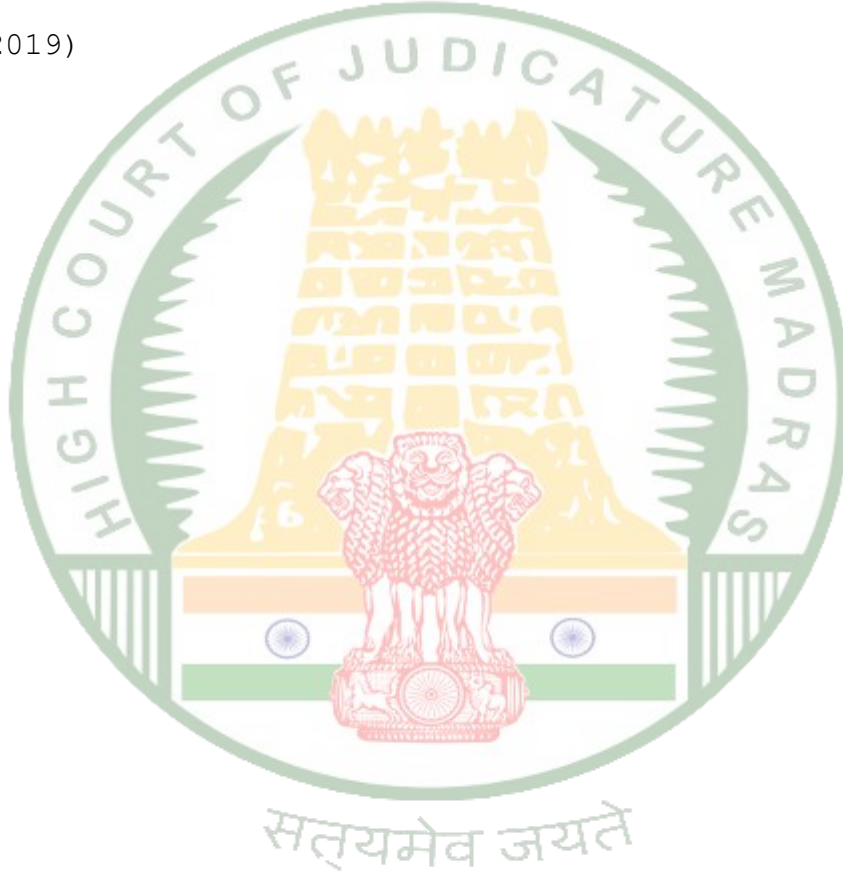
Copy To

The Section Officer,  
V.R. Section, High Court,  
Madras.(2 copies)

+2cc to Mr.V.B.Perumalraj, Advocate, S.R.No. 78551

S.A.No.1312 of 2005

BR(CO)  
GN(04/01/2019)



WEB COPY