

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.10.2018

PRONOUNCED ON : 02.11.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.Nos. 304, 305 and 306 of 2015

Amin Bibi (deceased)

1. Syed Jaffar
2. Syed Kadar

.... Appellants in S.A.Nos.304,
305 and 306 of 2015

Vs.

1. Syed Bashu
2. Thangaraju

.... Respondents 1 and 2 in S.A.Nos.
304 and 305 and respondent 1
and 3 in S.A.No.306 of 2015

3. Sekhar

.... Second Respondent in
S.A.No.306 of 2015

Prayer: Second Appeals filed under Section 100 of Civil Procedure Code, against the common judgment and decree dated 28.04.2011 passed in A.S.Nos.27, 146 and 147 of 2008 on the file of the Subordinate Judge, Perambalur, reversing the common judgment and decree dated 10.01.2007 passed in O.S.No.498, 781 and 598 of 2004 on the file of the District Munsif Judge, Permbalur.

For Appellants : Mr.G.Ilamurugu in all the appeals
For R1 : Mr.P.Mani in all the appeals
For R2 : No appearance in both appeals
For R3 : No appearance in S.A.No.306 of 2015
Set exparte vide order dated
10.10.2018.

JUDGMENT

The appellants and the first respondent in all the second appeals are the sons of Amin Bibi. Amin Bibi has laid the suit in O.S.No.598/04 against the first respondent and others for declaring that the decree dated 24.11.2003 passed in O.S.No.604 of 1995 on the file of the District Munsif Court, Perambalur as

null and void and for the permanent injunction restraining the first respondent and the second defendant therein, namely, Sekar from interfering with her peaceful possession and enjoyment of the suit properties described in the plaint schedule by way of creating any encumbrance or in any other manner at any time. It is seen that the first respondent herein has laid the suit in O.S.No.781 of 2004 against Thangaraj and the deceased Amin Bibi for evicting Thangaraj from the property described therein and also for the arrears of rent and future mesne profits as detailed therein. Thangaraj has laid the suit against the deceased Amin Bibi and the first respondent herein in O.S. No.498 of 2004 for the relief of permanent injunction to restrain the abovesaid parties, namely, Amin Bibi and the first respondent from dispossessing him from the suit property described therein till the lease period except under due process of law. All the abovesaid three suits were jointly tried and common judgment was pronounced by the trial court. Resultantly, the trial court had granted the relief in favour of Thangaraj as prayed for in O.S.No.498 of 2004 and also granted the reliefs in favour of the deceased Amin Bibi in respect of the first item of the suit properties described in the said suit as prayed for and dismissed her suit in respect of the second item of the suit properties described therein. The trial court had dismissed the suit laid by the first respondent in O.S.No. 781 of 2004. Aggrieved over the judgment and decree of the trial court in all the above three suits, the first respondent had preferred three first appeals. The first appellate court, on an appreciation of the materials placed on record, both oral and documentary, concluded the first appeals in favour of the first respondent and thereby set aside the judgment and decree of the trial court in all the three suits and resultantly dismissed the suit laid by Amin Bibi in O.S.No.598 of 2004 as well as the suit laid by Thangaraj in O.S.No.498 of 2004 and granted the reliefs in favour of the first respondent in the suit laid by him in O.S.No.781 of 2004, granting three months time to Thangaraj, the first defendant therein, to vacate the suit property and also directed the first respondent to claim future mesne profits from Thangaraj, the first defendant therein, by way of a separate proceeding under Order 20 Rule 12 of CPC and rejected his claim of arrears of rent for the period from June 2004 to September 2004. Aggrieved over the abovesaid judgment and decree of the appellate court in the first appeals, the present three second appeals have been preferred by the appellants.

2. It is found that after the dismissal of the suits by the trial court, Amin Bibi had died and accordingly her other two sons, namely, the appellants herein had contested the first appeals preferred by the first respondent before the first appellate court.

3. While admitting the second appeals, the following

substantial questions of law have been formulated

S.A. No.304 of 2015

a. Whether the finding of the court below that Ex.B1 deed is a gift settlement deed executed by the plaintiff in favour of the 1st defendant, by merely going on the nomenclature of the documents, without appreciating the recitals of the deed?

b. Whether the appellate court is not in error in holding that the 1st defendant is in possession inspite of the fact that the patta for the suit property stands in the name of the 1st defendant even after the execution of Ex.B1.

c. Whether the appellate court is right in holding that possession of the suit property was with the 1st defendant's when there was no material to prove that possession was handed over?

S.A.No.305 of 2015

a. Whether the appellate court is not in error in holding that the 1st defendant is in possession inspite of the fact that the patta for the suit property stands in the name of the 1st defendant even after the execution of Ex.B1?

b. Whether the finding of the appellate court that settlement deed in favour of the 1st defendant is not capable of being revoked, when there is specific obligation casted in the deed for maintenance of the plaintiff?

S.A.No.306 of 2015

a. Whether the finding of the court below that Ex.B1 deed is a gift settlement deed executed by the plaintiff in favour of the 1st defendant, by merely going on the nomenclature of the documents, without appreciating the recitals of the deed?

b. Whether the appellate court is not in error in holding that the 1st defendant is in possession inspite of the fact that the patta for the suit property stands in the name of the 1st defendant even after the execution of Ex.B1.

4. From the materials placed on record, it is seen that, as also admitted by Amin Bibi, she had executed a settlement deed dated 08.02.1993 in favour of the first respondent in respect of the suit properties and it is not in dispute that the suit properties comprised in O.S.No.598 of 2004 belonged to Amin Bibi. It is thus found that Amin Bibi, being competent to

settle the suit properties in favour of the first respondent herein, accordingly, had executed the settlement deed in his favour, which document has come to be marked as Ex.B1. Contending that the abovesaid settlement deed is invalid under law and would not confer any right, title or interest in respect of the properties comprised therein in favour of the first respondent and as the first respondent had failed to maintain her as assured by him, it is the case of Amin Bibi that she had cancelled the abovesaid settlement deed by a deed of cancellation dated 19.05.1995, the certified copy of the document has been marked as Ex.A1. Accordingly, further contending that the settled properties, in particular, the first item of the settled properties had continued to remain in her possession and enjoyment, it is her case that she had put up the basement in the said item and as the first respondent herein claimed title to the abovesaid property without any basis, it is her case that she had sent a notice to him narrating all the above said facts and to the same, the first respondent had sent a reply containing the false allegations and further according to Amin Bibi, in the suit laid by the first respondent against her and her other two sons for the relief of permanent injunction in O.S.No.604 of 1995 on the file of the District Munsif Court, Perambalur, it is contended that, as during the pendency of the abovesaid suit, the first respondent had repented for his behaviour and assured that he would maintain her till her life time without any complaint in the presence of the relatives and other persons and accordingly based on the abovesaid assurance, she had filed a memo in the said proceeding that the suit laid by the first respondent be decreed as prayed for without costs and accordingly the abovesaid suit ended in a decree in favour of the first respondent. However, contrary to the abovesaid assurance, as the first respondent had failed to maintain her and also declared that it is he who has title to the properties settled and also declared that he is going to sell the said properties to the second defendant Sekhar, accordingly, it is her case that she had been necessitated to lay the suit for necessary reliefs.

5. Therefore, as going by the case of Amin Bibi, it is seen that she had admitted the execution of the settlement deed in favour of the first respondent in respect of the suit properties marked as Ex.B1. The factum of the execution of the settlement deed in favour of the first respondent has also been reinforced by her by the alleged execution of the deed of cancellation dated 19.05.1995 marked as Ex.A1. The materials placed on record further go to show that the first respondent claiming to be in the possession and enjoyment of the properties settled in his favour under Ex.B1 and contending that the appellants herein, namely, the other sons of Amin Bibi had instigated the mother to create fictitious document, thereby, attempted to interfere with his possession and enjoyment of the suit properties,

accordingly, he has laid the suit in O.S.No.604 of 1995 against Amin Bibi and the appellants herein for the relief of permanent injunction. The said suit had been filed on the file of the District Munsif Court, Perambalur and as could be seen from the plaint filed in the abovesaid suit marked as Ex.A4 and the judgment and decree passed in the abovesaid suit marked as Exs.A5 and A6, and as admitted by Amin Bibi in her suit, Amin Bibi had filed a memo in the abovesaid suit submitting to the decree in favour of the first respondent as prayed for and in the abovesaid suit in O.S.No.604 of 1995, though the appellants herein had been arrayed as the defendants 2 and 3, it is found that they had not evinced interest to challenge the said case laid by the first respondent and resultantly they had been set exparte in the said suit and inasmuch as Amin Bibi had filed the memo submitting to the decree in the abovesaid suit, in all, based on the abovesaid memo filed by Amin Bibi and as the appellants herein had been set exparte in the abovesaid suit, resultantly, the concerned court had granted the decree in favour of the first respondent as prayed for and seeking for the declaration of the abovesaid decree as null and void, the suit in O.S.No.598 of 2004 has been laid by Amin Bibi as abovenoted.

6. Therefore, the main question that arises for consideration in the matter is whether Amin Bibi, would be entitled to revoke the settlement deed executed in favour of the first respondent marked as Ex.B1 by way of the deed of cancellation marked as Ex.A1. It is seen that nearly 2 years after the execution of Ex.B1 settlement deed, the deed of cancellation had been claimed to have been executed by Amin Bibi on 19.05.1995. Whether, after settling the suit properties in favour of the first respondent, would Amin Bibi, be leagly entitled to revoke the same has to be seen. Now, according to Amin Bibi, though she had settled the suit properties in favour of the first respondent by way of Ex.B1 document, the properties settled had continued to remain in her possession and enjoyment and it is she, who had inducted Thangaraju as the tenant in respect of the first item of the properties settled, collecting the rent and furthermore, she has also pleaded that inasmuch as the first respondent had failed to maintain her as assured by him, he is not entitled to the suit properties based on Ex.B1 settlement deed and accordingly she had revoked the same under Ex.A1 document. However, as rightly determined by the first appellate court, absolutely, there is no material placed on the part of Amin Bibi to evidence that she continued to be in the possession and enjoyment of the suit properties after Ex.B1 settlement deed. On the other hand, as per the recitals contained in Ex.B1 settlement deed, it is noted that, by way of the said deed, Amin Bibi had entrusted the possession of the properties settled in favour of the first respondent out of love and affection and with a view to enable him to put up the house construction in the vacant site for his livelihood and

accordingly thereby granted him absolute right in respect of the suit properties to be enjoyed by him independently in all aspects and also asserted that she would not, at any point of time, revoke the said settlement deed. Therefore, when there are clear recitals containing in Ex.B1 settlement deed as to the entrustment of the possession of the suit properties in favour of the first respondent and the fact remains that Amin Bibi had not reserved any right of revocation in her favour and considering the relationship of the parties, namely, the settlor and the settlee, being the mother and son and accordingly both are found to be living together at the relevant point of time and the first respondent had been maintaining Amin Bibi along with his family members, in such view of the matter, on account of love and affection, when Amin Bibi is found to have executed the settlement deed in favour of the first respondent and thereby entrusted the possession of the suit properties to him and also entrusted the deed of settlement to the first respondent, in such view of the matter, as rightly put forth by the first respondent's counsel, Amin Bibi would not be competent to revoke the settlement deed and therefore according to the first respondent, the alleged deed of cancellation marked as Ex.A1 is null and void. No doubt, under the Mohammedan law, the delivery of possession following the settlement deed is the essential sine-qua-non for the completion of the settlement. As regards the delivery of the possession of the suit properties as above noted, the recitals pertaining to the same are clearly averred in the settlement deed itself. That apart, the original settlement deed had been only produced by the first respondent marked as Ex.B1. As above noted, there is no material placed on the part of Amin Bibi that she had continued to remain in the possession and enjoyment of the suit properties after the execution of Ex.B1 settlement deed. On the other hand, the first respondent has placed materials to evidence his possession and enjoyment of the suit properties and accordingly it is seen that he had moved the necessary authorities for obtaining the permission to put up the construction in the suit properties and also obtained the patta and service connection in his name and paid necessary charges to the department concerned and this could be seen from the documents marked as Exs.B9 to B14. Therefore, when it is noted that following Ex.B1 settlement deed, it is only the first respondent, who has been in the possession and enjoyment of the suit properties and consequently, had also obtained the service connection and endeavoured to put up the construction thereon by obtaining necessary permission from the authorities concerned, in all, it is seen that the claim of Amin Bibi that she had continued to remain in the possession and enjoyment of the suit properties despite the execution of B1 settlement deed in favour of the first respondent, as such, cannot be countenanced.

7. Amin Bibi claims that, it is she, who had inducted Thangaraju as a tenant in respect of the first item of the suit properties. Per contra, the first respondent would claim that, it is he, who had inducted Thangaraju as the tenant in respect of the first item of the suit properties. Though, Thangaraju is found to have been supporting the case of Amin Bibi, he has not chosen to examine himself either in support of his case in O.S.No.498 of 2004 or in support of the case of Amin Bibi as a witness on her side and no document had been produced by him or by Amin Bibi evidencing the payment of the rent by him to Amin Bibi. On the other hand, as rightly determined by the first appellate court, considering the fact that it is only the first respondent who had been in the possession and enjoyment of the suit properties and accordingly it is found that, as rightly determined by the first appellate court, it is only the first respondent, who had let in Thangaraju as the tenant in respect of the first item of the suit properties and accordingly, the claim of the first respondent that Thangaraju had been the tenant only under him and not under the mother has been rightly affirmed and determined by the first appellate court.

8. Insofar as the claim of the possession of the suit properties by Amin Bibi, despite the execution of Ex.B1 settlement deed, as rightly pointed out by the counsel appearing for the first respondent, when there are clear recitals in the settlement deed as to the entrustment of the possession of the properties settled, that would be sufficient to hold that the delivery of possession had been effected or taken over by the settlee and it is for the other side to rebut the same and it is also noted that when the settlee had produced the deed of settlement, which had been entrusted to him by the settlor evidencing the delivery of possession, that by itself, would be the ample proof to establish the transfer of possession and the abovesaid principles of law had been enunciated in the decision of the Apex Court dated 14.12.2007 passed in Civil Appeal (civil) 5942 of 2007 (Asokan v. Lakshmikutty and others) and the relevant passages are extracted below:

"21. In Alavi (supra), Paripoornan, J. (as His Lordship then was) held:

It is settled law that where the deed of gift itself recites that the donor has given possession of the properties gifted to the donee, such a recital is binding on the heirs of the donor. It is an admission binding on the donor and those claiming under him. Such a recital raised a rebuttable presumption and is ordinarily sufficient to hold that there was delivery of possession. Therefore, the burden lies on those who allege or claim the contrary to prove affirmatively that in spite of the recitals in the gift deed to the effect that possession has been delivered over, in

fact, the subject matter of the gift was not delivered over to the donees.

26. In regard to handing over of the possession, it was held:

In the second place, the deed of gift was handed over to the donee as soon as it was registered. In the case of a gift by a husband to his wife, their Lordships do not think that Mahomedan law requires actual vacation by the husband and an actual taking of separate possession by the wife. In their opinion the declaration made by the husband, followed by the handing over of the deed are amply sufficient to establish a transfer of possession".

Similarly, the abovesaid position had been reiterated by our High Court in the decision reported in AIR 1958 Mad 527 (S.V.S. Muhammad Yusuf Rowther and another v. Muhammad Yusuf Rowther and others) and the position of law has been discussed in the abovesaid decision as follows:

"13. In my judgment, learned Counsel for the appellants is justified in his complaint that the Courts below have wrongly thrown the onus of proving that this requirement as to delivery of possession had been complied with on the contesting defendants. It is no doubt true that delivery of possession of gifted properties is an essential condition of the validity of the gift and its operative nature under the Muslim law and it would be for the donees to establish it. But the Courts below have failed to appreciate the evidentiary value of the declaration by the donor which constitutes an admission as against him and those claiming under him. In Exhibit B-1 the donor said:

I have by means of this document settled on you the immovable properties.... which are described hereunder which belong to me absolutely and which are in my possession and enjoyment and left them in your possession. Both of you shall from this day onwards hold and enjoy in peace the gift properties with absolute right and with powers of alienation.... You shall if you so desire enjoy the settlement property jointly in 'common or enjoy the same by dividing by metes and bounds.

The effect of a recital of this type by a donor was the subject of consideration in an early decision of the Privy Council reported in Sheikh Muhammad Mumtaz Ahmed

v. zubaida Jan (1889) L.R. 16 I.A. 205 : I.L.R. 11 All. 460 (P.C.). One of the points in controversy in that case related to the validity of a deed of gift and one of the grounds upon which the operative character of the deed was challenged was that possession had not been delivered by the donor in pursuance of the deed. Sir Barnes Peacock who delivered the judgment of the Privy Council said:

In the deed of gift she (the donor) declared (an admission by which Usman as her heir and all persons claiming through him were bound) that she had made the donee possessor of all the properties given by the deed ; that she had abandoned all connection with them ; and that the donee was to have complete control of every kind in respect thereof.

14. This is therefore authority for the position that a declaration by the donor of having parted with possession of the property was an admission and one which was binding upon those who claimed under him. This question was again before the Judicial Committee in Mohammad Sadiq Alikhan v. Fakhr Jahan Begam (1931) 62 M.L.J. 320 : L.R. 59 I.A. 1 : I.L.R. 6 Luck. 556 (P.C.). The opinion of the Council was delivered by Sir George Lowndes who said in dealing with the conditions necessary to be satisfied before a gift by a Muslim could be upheld:

The second objection involves some consideration of the Mohamedan law. It is not disputed that a gift of immovable property must ordinarily be completed by a transfer of possession and there seems to be no difference on this point between Hanafi and Shia Law. The Chief Court thought it was clear that Kakhr Jahan had taken actual possession but it is pointed out that this was only after her husband's death. So long as Baquar Ali was alive she merely resided there with him and no change seems to have been made in the method of their joint occupation. But in the first place the deed contains the statement; 'I deliver possession of the gifted property to my said wife ' and this as a declaration of fact must be regarded as binding on the heirs of the donor. (See Sheik Muhammad Mumtaz v. Zubaida Jan (1889) L.R. 16 I.A. 205 : I.L.R. 11 All. 460 (P.C.) In their opinion the declaration made by the husband, followed by the handing over of the deed, are amply sufficient to

establish a transfer of possession.

These two decisions were cited to the Courts below but they held that their effect was somewhat modified and that the law as laid down by them was dependent upon the special circumstances of each of those cases, relying on a decision of the Bombay High Court in *Nurbai v. Abhram Muhmad* MANU/MH/0026/1939 : A.I.R. 1939 Bom. 449. I am unable to concur in this view. The learned Judges of the Bombay High Court distinguished the observations of the Privy Council which I have extracted earlier on the specific ground that in the case before them the person who challenged the deed was not claiming under the donor, but under an independent title. But this apart, there was also the further fact that on the facts proved in the Bombay case those who impugned the gift had been able to establish that possession was not in fact transferred. In my judgment there are no such circumstances in the present case. The proper rule to apply here as regards the burden of proof would be to hold that the declaration by the donor of his having parted with possession was an admission binding upon the plaintiffs and the 3rd defendant which however they might by cogent evidence disprove but that in the absence of independent proof by them the presumption raised by the admission ought to suffice to support the deed.

15. Both the Courts below have based their decision against the appellants not having discharged the burden of proof thrown upon them to establish the essential condition of law to sustain the validity of the gift. The concurrent finding of both the Courts below merely goes to this length, namely, that the appellants had not proved that the gift was operative. In considering the question in this manner the Courts have committed an error and I cannot therefore accept that finding as binding on me".

9. The deceased Amin Bibi has raised the plea that inasmuch as, the first respondent had failed to maintain her contrary to the assurance given by him, accordingly, she is entitled to revoke the settlement deed Ex.B1 executed in his favour. However, as rightly determined by the first appellate court, no such reservation had been reserved by Amin Bibi in Ex.B1 settlement deed with reference to her right of revocation on the failure of the first respondent in maintaining her. Even, the abovesaid case of Amin Bibi that she had not been maintained by the first respondent is being contested and challenged by the

first respondent. As above noted, according to the first respondent, only at the instigation of his brothers, namely, the appellants, Amin Bibi had been acting against his interest and thereby, endeavored to revoke the settlement deed by way of Ex.A1 document. As to whether, AminBibi would be entitled to revoke the settlement deed on the failure of the first respondent to maintain her, the position of law is that, even assuming for the sake of arguments that the first respondent had failed to maintain Amin Bibi contrary to the assurance given by him, that by itself, would not entitle Amin Bibi to revoke the settlement deed and the abovesaid position of law has been outlined in the decision rendered by this Court on 27.11.2017 in S.A. No.782 of 2001 (G.Loganathan and another v. G.Selvaraj and another), wherein the position of law has been outlined as follows:

"15. It is however, further contended by the defendants' counsel that the plaintiff has failed to maintain his father and provide support to him after Ex.A1 and this would dis-entitle the plaintiff to claim right to the property comprised under the said document. However, the mere fact that the plaintiff has failed to maintain the settlor, by itself would not be the basis for revoking the settlement deed and the above position, has been rightly determined by the courts below, taking into consideration the authorities cited with reference to the same. Therefore, the courts below have rightly held that the document Ex.A1 is only a settlement deed and not a will and that Ex.A1 document is an irrevocable settlement deed and the plaintiff cannot be deprived of the entitlement of the property comprised therein, merely on his failure to maintain his father, being one of the conditions imposed in settlement deed and accordingly, the courts below had rightly held that Ex.A1 does not confer any right upon the first defendant to revoke the same and it is further found that the courts below have rightly held that the settlement deed Ex.A1 has been proved by the plaintiff as per the provisions of the Indian Evidence Act and in this connection, the evidence of Pws.1 to 3 are found to in conformity of an supportive to the case of the plaintiff as set out in the pleadings and thus the evidence of Pws. 1 to 3 are found to be acceptable, reliable and convincing".

Similarly, the same could also be gathered from the decision reported in (1968)2MLJ284 (Minor Sivaraman and others v. P.M.Shanmugasundara Mudaliar and others)

"7. There is no substance in the contention that the settlement deed Exhibit A-2 was executed by Karuppuswami in favour of Kaveriammal on condition that she should maintain him and hence Karuppuswami was

entitled to revoke the settlement deed on the failure of Kaveriammal to maintain him. Under Exhibit A-2 Karuppuswami Mudaliar has given absolute interest in the properties covered by it to Kaveriammal. It is true one of the terms of the settlement deed is that Kaveriammal should maintain Karuppuswami during his lifetime. But there is no power of revocation in the settlement deed Exhibit A-2. Whatever cause of action Karuppuswami might have had to recover maintenance from Kaveriammal, he had no right to cancel the settlement deed Exhibit A-2. Hence the revocation of the settlement deed by Karuppuswami is invalid".

The abovesaid position of law could also be gathered from the decision of the High Court of Himachal Pradesh reported in AIR 1995HP117 (Mool Raj v. Jamna Devi and others).

10. In the light of the abovesaid decisions, the case of Amin Bibi that she is entitled to revoke the settlement deed Ex.B1, as the first respondent had failed to maintain her, as such, cannot be legally countenanced, particularly, considering the recitals found in Ex.B1 and particularly, when under Ex.B1, Amin Bibi had conveyed absolute title, right and interest in favour of the first respondent in respect of the suit properties and also handed over the possession of the suit properties to him and also not reserved any right of revocation of the settlement deed at any point of time, whatsoever. Such being the position, the case projected by Amin Bibi that she had cancelled the settlement deed Ex.B1 by way of Ex.A1 document, cannot be accepted in any manner.

11. As to whether Amin Bibi would be entitled to seek the declaration that the decree passed in O.S.No.604 of 1995 dated 08.08.1995 is null and void, as could be seen from the materials placed on record, admittedly, Amin Bibi had filed a memo in the abovesaid suit submitting to the decree in favour of the first respondent. As seen above, the present appellants had been set exparte in the said suit. Accordingly, the said suit ended in a decree in favour of the first respondent. When according to the first respondent in the said suit that Amin Bibi at the instigation of the appellants herein is attempting to create factious document and thereby Amin Bibi and the appellants are interfering with his possession and enjoyment of the suit properties and when the suit is found to have been laid during 1995, when according to Amin Bibi, she had revoked the settlement deed on 19.09.1995 and furthermore, as per her case, during the pendency of O.S.No.604 of 1995, as the first respondent had repented for his conduct and behaviour and assured that he would maintain her, she had submitted to the decree in the same case by filing a memo, but, on the contra, when the same had been repudiated by the first respondent, it is for Amin Bibi to establish that any such assurance had been given by the first

respondent during the pendency of O.S.No.604 of 1995. At this juncture, it has to be noted that it is the consistent case of the first respondent that he had been all along maintaining Amin Bibi, and only at the instigation of the appellants herein, Amin Bibi had been acting adversely against his interest. As regards the abovesaid case of Amin Bibi, it is seen that she had chosen to examine Pws.2 and 3 in support of her said version. However, on an analysis of the evidence of Pws.2 and 3, with reference to the same, they would state that with reference to the said mediation between the parties, the first respondent had given the assurance that he would maintain Amin Bibi in the panchayat convened before the Jamat and both would state that normally in the panchayat convened in the Jamat, the determination made therein, would be recorded in writing and when with reference to the abovesaid determination of the Jamat, no written document has been projected by either of them or by Amin Bibi and when Pws.2 and 3 are not found to be occupying any important position in the Jamat concerned as the Muthavalli or the members thereof and when it is seen that Pws2 and 3 are closely associated with Thangaraj, the tenant, who had been all along supporting Amin Bibi, in all, it is seen that the first appellate court, on a proper appreciation of their evidence in toto, rightly did not place reliance upon their evidence to accept the case of Amin Bibi. Therefore, the case projected by Amin Bibi that, pending O.S.No.604 of 1995, as the first respondent had again reiterated his assurance that he would maintain her and thereby, she had filed the memo submitting to the decree, as such, cannot be countenanced, particularly, when the same had been repudiated by the first respondent and when with reference to the same, no acceptable and reliable evidence had been placed by Amin Bibi. When the evidence adduced with reference to the same through Pws2 and 3 are found to be unacceptable and unsafe to be relied upon, no exception could be taken in the rejection of their evidence by the first appellate court.

12. The position, thereby, would remain that knowing that she had executed the settlement deed in favour of the first respondent in respect of the suit properties and it is only the first respondent who has been in the possession and enjoyment of the same and further knowing fully well that it is only the first respondent, who had been all along maintaining her and accordingly unable to resist the case laid by the first respondent and accordingly finding that the appellants herein had remained exparte in O.S.No.604 of 1995 and did not come forward to support her case and as she had not independently acted against the interest of the first respondent and on the other hand had been found to be acting only at the instigation of the appellants herein, her other sons, resultantly, as rightly put forth, good wisdom prevailed upon Amin Bibi and thereby, she had, by filing a memo submitted to the decree in O.S.No.604 of 1995 laid by the first respondent, and resultantly, the said suit

ended in a decree in favour of the first respondent. The position being above, the present case projected by Amin Bibi that she had been misled by the first respondent in giving such an assurance and thereby she had filed the memo submitting to the decree, as such, cannot be countenanced. When with reference to the abovesaid case of Amin Bibi, as above discussed, there is no reliable proof forthcoming, the first appellate court is found to have rightly rejected her abovesaid case.

13. In addition to that, as rightly put forth by the counsel appearing for the first respondent, when Amin Bibi is found to have submitted to the decree in O.S.No.604 of 1995 by filing a memo, she thereafter cannot be allowed to lay the suit challenging the same on the footing that the decree passed on the basis of the said memo or compromise was not lawfully effected. In this connection, the counsel placed reliance upon Order 23 Rule 3-A of the code of Civil Procedure which reads as follows:

3-A. Bar to suit - No suit shall lie to set aside a decree on the compromise on which the decree is based was not lawful.

When the circumstances under which she had come to file the memo submitting to the decree in O.S.No.604 of 1995 have not been established by Amin Bibi, it is seen that the memo filed by her in the said suit had been voluntarily filed and thereby, when on the basis of the understanding/compromise reached between the parties, she had submitted to the decree in the said suit, thereafter, she would not be competent to challenge the said decree on the footing that the memo or the compromise which had been filed by her was not lawfully made or that she had been misled in filing the abovesaid memo. In this connection, the counsel for the respondent would rely upon the decision of the Apex court reported in AIR 1993SC1139 (Banwari Lal v. Chando Devi (through L.R) and ors) and the position of law has been outlined as follows:

"Civil - compromise - Order 23 Rules 1 and 3 and Section 151 of CPC, 1908, Indian Contract Act, 1872 and Order 23 Rule 1 of CPC (Amendment) Act, 1976 - Court before which compromise petition is filed and which has recorded compromise has to decide question whether adjustment or satisfaction is arrived on basis of any lawful agreement - court has to examine whether compromise is void or voidable under Indian Contract Act - though application for exercise of power under Order 23 Rule 3 can be labeled under Section 151 - Power in appropriate cases has to be exercised under proviso to Rule 3.

6. The experience of the courts has been that on many occasions parties having filed petitions of compromise on basis of which decrees are prepared, later for one reason or other challenge the validity

of such compromise. For setting aside such decrees suits used to be filed which dragged on for years including appeals to different courts. Keeping in view the predicament of the courts and the public, several amendments have been introduced in Order 23 of the Code which contain provisions relating to withdrawal and adjustment of suit by Civil Procedure Code (Amendment) Act, 1976. Rule 1 of Order 23 of the Code prescribes that at any time after the institution of the suit, the plaintiff may abandon his suit: or abandon a part of his claim. Rule 1(3) provides that where the Court is satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw such suit with liberty to institute a fresh suit. In view of Rule 1(4) if plaintiff abandons his suit or withdraws such suit without permission referred to above, he shall be precluded from instituting any such suit in respect of such subject-matter. Rule 3 of Order 23 which contained the procedure regarding compromise of the suit was also amended to curtail vexatious and tiring litigation while challenging a compromise decree. Not only in Rule 3 some special requirements were introduced before a compromise is recorded by the Court including that the lawful agreement or a compromise must be in writing and signed by the parties, a proviso with an explanation was also added which is as follows:-

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation - An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.

7. By adding the proviso along with an explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the Court

which had recorded the compromise in question. That Court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The explanation made it clear that an agreement or a compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of the said Rule. Having introduced the proviso along with the explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3A in respect of institution of a separate suit for setting aside a decree on basis of a compromise saying :-

3A. Bar to suit - No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

8. Earlier under Order 43, Rule 1(m), an appeal was maintainable against an order under Rule 3 of Order 23 recording or refusing to record an agreement, compromise or satisfaction. But by the amending Act aforesaid that clause has been deleted; the result whereof is that now no appeal is maintainable against an order recording or refusing to record an agreement or compromise under Rule 3 of Order 23. Being conscious that the right of appeal against the order recording a compromise or refusing to record a compromise was being taken away, a new Rule 1A has been added to Order 43 which is as follows:-

A. Right to challenge non-appealable orders in appeal against decrees.-

(1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded.

9. Section 96(3) of the Code says that no appeal shall lie from a decree passed by the Court with the consent of the parties. Rule 1A(2) has been introduced saying that against a decree passed in a

suit after recording a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should not have been recorded. When Section 96(3) bars an appeal against decree passed with the consent of parties, it implies that such decree is valid and binding on the parties unless set aside by the procedure prescribed or available to the parties. One such remedy available was by filing the appeal under Order 43, Rule 1(m). If the order recording the compromise was set aside, there was no necessity or occasion to file an appeal against the decree. Similarly a suit used to be filed for setting aside such decree on the ground that the decree is based on an invalid and illegal compromise not binding on the plaintiff of the second suit. But after the amendments which have been introduced, neither an appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered by Rule 3A of Order 23. As such a right has been given under Rule 1A(2) of Order 43 to a party, who challenges the recording of the compromise, to question the validity thereof while preferring an appeal against the decree. Section 96(3) of the Code shall not be a bar to such an appeal because Section 96(3) is applicable to cases where the factum of compromise or agreement is not in dispute".

The above position of law has also been reiterated by the Bombay High Court in the decision reported in 2006(6)Bom CR454 (Damodar Tukaram Gaunkar v. Gopinath Rama Gaunkar and ors) following the abovesaid decision of the Apex Court and the position of law has been outlined in the abovesaid decision as follows:

"5. As regards question (a) Shri Sonak the learned Counsel on behalf of the defendant has submitted that no separate suit was maintainable for setting aside the said compromise arrived at between the parties on the ground of alleged fraud in view of the bar of Rule 3-A, Order 23, C.P.C. and if at all the plaintiff wanted the said judgment/decreed set aside, the plaintiff ought to have made an application in that very suit. Rule 3-A of Order 23 C.P.C. which reads as follows:

3-A. Bar to suit. - No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

6. Shri Sonak has placed reliance on the case of (Anant Mahadeo Godbole v. Achut Ganesh Godbole and Ors.) MANU/MH/0341/1981: AIR1981bom357 and and (Banwari Lal v. Chando Devi (Smt) (through LRS) and Anr.), MANU/SC/0152/1993: AIR1993SC1139, while Shri B.

D'Costa, the learned Senior Counsel on behalf of the plaintiff, has placed reliance on the case of (Jethalal C. Thakkar and Ors. v. Lalbhai Hir Lal Shah) 1986 (Supp.) Bom.C.R. 259 : 1985 Mh.L.J. 299.:MANU/MH/0467/1983: 1985 Mh.L.J.299.

7. The answer to question (a) is no longer res integra and is now settled with the authoritative pronouncement of the Supreme Court in the case of Banwari Lal (supra) and therefore there is no necessity of referring to the judgment of this Court in the case of Jethalal C. Thakkar (supra).

8. Order 23 C.P.C. deals with withdrawal and adjustment of suits and Rule 3 thereof provides that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise (in writing and signed by the parties), or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith [so far it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit]:

[Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment. The explanation below the proviso states that an agreement or compromise which is void or voidable under the Indian Contract Act, 1872, shall not be deemed to be lawful within the meaning of this Rule.]

9. As already seen Rule 3-A creates a bar for the filing of a suit by providing that no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. Needless to observe the provisions of Rule 3-A are quite explicit to the effect that a separate suit will not be maintainable in case a compromise decree is challenged as being not lawful. This Court in the case of Anant Mahadeo Godbole v. Achut Ganesh Godbole and Ors. , MANU/MH/0341/1981: AIR1981Bom357, stated that the very object of introducing Rule 3-A in Order 23 C.P.C. was to bar the filing of a second suit on the ground that

the compromise was not lawful. The Court held that the words "not lawful" are wide enough and would take in the cases where parties set up want of authority or exceeding of authority in the matters of agreements or compromises on the basis of which the decrees are made and all types of challenges cannot now, because of bar to suit under Rule 3-A, be the subject-matter of a second suit. The Court held that the explanation which is added to Rule 3 provides that an agreement or a compromise which is void or voidable under the Indian Contract Act, 1872 shall not be deemed to be lawful within the meaning of that rule. In other words, agreement or compromise should be free from challenges on the ground that they are void or voidable under the provisions of the Indian Contract Act. The explanation so enacted has a purpose to make it clear that it is only lawful agreements or compromises that can be the basis of passing the decrees. The Explanation adds a clarification again because of the earlier conflict as to whether voidable agreements within the meaning of Section 19-A of the Indian Contract Act were or were not excluded from the operation of Rule 3 itself. The Explanation and the amendments introduced in Rule 3 are self-contained and will have to be restricted to the recording of the compromise and making orders therefore. And these cannot further be read in the body of Rule 3-A so as to restrict the meaning of the words "not lawful". Now the Supreme Court in the case of Banwari Lal (supra) has observed that the experience of the courts had been on many occasions parties having filed petitions of compromise on basis of which decrees are prepared, later for one reason or other challenge the validity of such compromise. For setting aside such decrees suits used to be filed which dragged on for years including appeals to different courts. Keeping in view the predicament of the courts and the public, several amendments have been introduced in Order 23 of the Code which contain provisions relating to withdrawal and adjustment of suit by Civil Procedure Code (Amendment) Act, 1976. Further the Supreme Court has stated that Rule 1 of Order 23 of the Code prescribes that at any time after institution of the suit, the plaintiff may abandon his suit or abandon a part of his claim. Rule 1(3) provides that where the Court is satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw such suit with liberty to institute a fresh suit. In view of Rule 1(4)

if plaintiff abandons his suit or withdraws such suit without permission referred to above, he shall be precluded from instituting any such suit in respect of such subject-matter. Rule 3 of Order 23 which contained the procedure regarding compromise of the suit was also amended to curtail vexatious and tiring litigation while challenging a compromise decree. Not only in Rule 3 some special requirements were introduced before a compromise is recorded by the Court including that the lawful agreement or a compromise must be in writing and signed by the parties, a proviso with an explanation was also added. By adding the proviso along with an explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the Court which had recorded the compromise in question. That Court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The explanation made it clear that an agreement or a compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of the said Rule. Having introduced the proviso along with the explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3-A in respect of institution of a separate suit for setting aside a decree on basis of a compromise. Referring to Section 96(3) of the Code, the Supreme Court observed that although the said section says no appeal shall lie from a decree passed by the Court with the consent of the parties, Rule 1-A(2) was introduced saying that against a decree passed in a suit after recording a compromise it shall be open to the appellant to contest the decree on the ground that the compromise should not have been recorded. The Supreme Court observed that when Section 96(3) bars an appeal against decree passed with the consent of parties, it implies that such decree is valid and binding on the parties unless set aside by the procedure prescribed or available to the parties. One such remedy available was by filing the appeal under Order 43, Rule 1(m). But after the amendments which have been introduced, neither an appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered by Rule 3-A of Order 23. As such a right has been given under Rule 1-A(2) of Order 43 to a party, who challenges the recording of the compromise, to question the validity thereof while preferring an appeal against the decree. Section 96(3) is applicable to cases where the factum of compromise or agreement is not in dispute.

10. In the light of Rule 3-A of Order 23 and the authoritative pronouncement of the Supreme Court in the case of Banwari Lal (supra), the question (a) has got to be answered in favour of the defendant. In view of that a separate suit filed by the plaintiff to challenge the consent decree deserved to be dismissed, as not maintainable".

The same has been reiterated by the Apex Court in the judgment dated 11.06.2006 passed in Appeal (civil) 2896 of 2006 (Pushpa Devi Bhagat (D) Th. LR.Smt. Sadhana Rai v. Rajinder Singh & ors) and the position of law has been culled out as follows:

"11. Section 96 provides for appeals from original decrees. Sub-section (3) of section 96, however, provided that no appeal shall lie from a decree passed by the court with the consent of the parties. We may notice here that Order 43 Rule 1 (m) of CPC had earlier provided for an appeal against the order under Rule 3 Order 23 recording or refusing to record an agreement, compromise or satisfaction. But clause (m) of Rule 1 Order 43 was omitted by Act 104 of 1976 with effect from 1.2.1977. Simultaneously, a proviso was added to Rule 3 Order 23 with effect from 1.2.1977. We extract below the relevant portion of the said proviso :

"Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the court shall decide the question"

Rule 3A was also added in Order 23 with effect from 1.2.1977 barring any suit to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

12. The position that emerges from the amended provisions of Order 23, can be summed up thus :

(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in section 96(3) CPC.

(ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) Rule 1 Order 43.

(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3A.

(iv) A consent decree operates as an estoppel and is

valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 of Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree, is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21.8.2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27.8.2001), filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by second defendant was not maintainable, having regard to the express bar contained in section 96 (3) of the Code.

Re : Point No. (ii)"

14. In the light of the abovesaid position of law, when it is seen that Amin Bibi had voluntarily submitted a memo in O.S.No.604 of 1995 submitting to the decree as prayed for by the first respondent, thereafter, she is not entitled to challenge the same by way of separate suit in O.S.No.598 of 2004 and her remedy would be, only by filing the necessary application before the concerned court or by way challenging the said decree by preferring an appeal as outlined above. On that score also, as rightly put forth by the first respondent's counsel, the suit laid by Amin Bibi is found to be not legally sustainable.

15. The counsel appearing for the appellants would contend that evidence had been adduced in the matter on the part of the first respondent that Amin Bibi had collected the rent from Thangaraju from June 2004 onwards, however, as rightly found by the first appellate court, inasmuch as, the first respondent is found to have been providing support and succour to Amin Bibi, accordingly, it is seen that towards her maintenance, the abovesaid rent amount had been allowed to be paid to Amin Bibi

and thereby it cannot be construed that the rent had been paid to Amin Bibi on the footing that she has title to the suit properties as sought to be made out. Therefore, the above piece of evidence adduced on the part of the first respondent, by itself, would not, in any manner, undermine his case or advance the case of Amin Bibi or the case of Thangaraj, accordingly, it is seen that the first appellate court had also disallowed the claim of arrears of rent sought by the first respondent from Thangaraju for the period from June 2004 to September 2004.

16. Insofar as the case projected by Thangaraju, he has not tendered evidence in support of his case or also not come forward as a witness in support of the case of Amin Bibi, though, it is seen that both Amin Bibi and Thangaraju has been sailing together, however, according to the first respondent, both had joined together only to defeat his interest. Accordingly, considering the materials placed on record, as above discussed, as determined by the first appellate court rightly, it is seen that following Ex.B1 settlement deed, it is only the first respondent, who has right, title and interest in respect of the suit properties and thereafter Amin Bibi would not be entitled to revoke the same in any manner and accordingly Amin Bibi is found to have acted adversely against the interest of the first respondent only at the instigation of the appellants and thereby it is noted that realising her mistake, at a later point of time, she had voluntarily and willingly submit to the decree in the case laid by the first respondent in O.S.No.604 of 1995 and thereafter had chosen to lay the present suit only at the instigation of the appellants herein and in toto it is seen that as the first respondent is found to be having the legal right, title and interest in respect of the suit properties and it is he, who has been in the possession and enjoyment of the same by putting up the foundation after obtaining necessary permission from the authorities concerned and also found to have obtained the service connection in his name and as above noted, when there is no material placed on the part of the Amin Bibi to evidence her claim of possession and enjoyment, resultantly, as rightly determined by the first appellate court, it is only the first respondent, who had inducted Thangaraju as the tenant in respect of the first item of the suit properties and not Amin Bibi and thereby it is seen that the first appellate court is justified in granting the reliefs in favour of the first respondent in the suit laid by him in O.S.No.781 of 2004.

17. The counsel for the appellants in support of his various contentions placed reliance upon the decisions reported in

1. 2010(1) MWN (civil) 683 (Durai v. Kamala and another)

2. 2014(5) CTC 801 (N.Kaliamoorthy and others v. Vairavan Chettiar)
3. 1996(II) CTC 279 (Dharman & six others v. Marimuthu)
4. (1997) 2 SCC 636 : (1996) 9 scale 332 : (1996) 9 Suppl. SCR 418 (Baby Ammal v. Rajan Asari)
5. 2018 (1) MWN (civil) 402 (Rosal v. Selvaraj (died) and twenty four others)
6. 2009(6) CTC 107 (Seenappa v. R.Krishnapa and others)

7. W.P.No.18051 of 2011 and M.P. No.1. Of 2011 (S.M.Syed Mohammed Buhari v. The sub Registrar (District Registrar Cadre), Triplicane, Chennai and others)
8. 2015 (2) CTC 365 (Sellayi (deceased) and others v. Valliammal @ Pappu and others)

The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at the hand.

18. For the reasons aforestated, Ex.B1 settlement deed is found to be a valid document executed in favour of the first respondent by Amin Bibi and thereby it is only the first respondent, who has got the legal right, title and interest in respect of the suit properties and Amin Bibi is not entitled to revoke the same and it is further seen that it is only the first respondent, who has been in the possession and enjoyment of the suit properties and asserting the same, put up the foundation and also inducted Thangaraju as the tenant in the first item of the suit properties and the substantial questions of law formulated in the second appeals are accordingly answered against the appellants and in favour of the first respondent.

19. For the reasons aforestated, all the second appeals fail and are accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

bga

To

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

+4cc to Mr.P.Mani, Advocate sr.no.75705, 75706, 76275,
75707

+3cc to G.Ilamurugu, Advocate sr.no.75637, 73638,
75639

S.A.Nos. 304, 305
and
306 of 2015

rj(co)
nr 11/12/2018



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