

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.11.2017
PRONOUNCED ON : 19.01.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.1804 of 2001

Minor Shankar,
represented by his mother Nallammal,
Veppur Village,
Virudhachalam taluk,
Cuddalore District. ...Appellant/Respondent/
Plaintiff

Vs.

1. Muruganandam
2. Manicka Servai ...Respondents/Appellants/
Defendants

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree of the Court of the Principal Sub Judge, Virudhachalam in A.S.No. 19/2000 dated 16.07.2001 in reversing the well considered judgment and decree of the Court of the Principal District Munsif, Virudhachalam in O.S.No.193/92 dated 16.06.2000.

For Appellant : Mrs. V.Srimathi
For Respondents: Mr.R.N.Kothandaraman

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 16.07.2001 passed in A.S.No. 19/2000 on the file of the Principal Sub Court, Virudhachalam, reversing the judgment and decree dated 16.06.2000 passed in O.S.No.193/92 on the file of the Principal District Munsif Court, Virudhachalam.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for declaration and permanent injunction / Possession.

4. The case of the plaintiff, in brief, is that the suit properties belonged to the father of the minor plaintiff, Thangarasu and Thangarasu had two wives and the first defendant was born to him through his first wife Susila and after the demise of Susila, Thangarasu married the minor plaintiff's mother, Nallammal and through Nallammal he begot the minor

plaintiff as his only heir and Thangarasu died in 1989 and while he was alive, on 03.06.1974, Thangarasu executed the settlement deed in respect of the first item of the suit properties in favour of the first defendant, while he was a minor represented by his guardian mother Susila and however, neither the first defendant nor his mother Susila had taken the possession of the properties comprised in the settlement deed dated 03.06.1974 and enjoyed the same and hence, the settlement deed dated 03.06.1974 did not come into force and after the demise of Susila, the first wife, Thangarasu cancelled the settlement deed dated 03.06.1974 by a cancellation deed dated 10.08.1989 and as the settlement deed dated 03.06.1974 did not come into force, it was only Thangarasu, who had been in possession and enjoyment of the properties comprised thereunder and further, Thangarasu on 10.08.1989 also bequeathed the suit properties in favour of the plaintiff by way of a registered Will and after the demise of Thangarasu, the plaintiff, represented by his guardian mother Nallammal, has been in possession and enjoyment of the suit properties and the defendants are not entitled to question the title and interfere with the possession and enjoyment of the suit properties by the plaintiff and on the other hand, as the defendants attempted to interfere with the peaceful possession and enjoyment of the suit properties by the plaintiff, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5. The case of the first defendant, in brief, is that the suit is not maintainable either in law or on facts. The suit properties are the ancestral properties of the first defendant and in respect of the suit properties, the first defendant's father Thangarasu had executed a settlement deed dated 03.06.1974 and thereby, the first defendant, represented by his mother, had accepted the settlement deed and obtained the possession of the properties comprised thereunder and enjoying the same and therefore, it is false to state that the above said settlement deed had not come into force and that the same had been cancelled. It is false to state that the first defendant's father, after the demise of his first wife Susila, had married the plaintiff's mother Nallammal and it is false to state that the plaintiff is the son of Thangarasu. The plaintiff's mother Nallammal is married at Nannai village, Trichy district and living with her real husband and while so, the plaintiff cannot project the case, as if, Thangarasu had married his mother as the second wife and the above relationship is not admitted and not tenable and it is false to state that Thangarasu had cancelled the settlement deed 03.06.1974 and bequeathed the suit properties in favour of the plaintiff by way of a Will and the Will projected is not true and invalid and in order to grab the suit properties illegally, the plaintiff and his mother had created the Will and the same is not binding upon the first defendant and as the defendant is entitled to the suit properties and enjoying the same, hence, the suit is labile to be dismissed.

6. In support of the plaintiff's case, PWs 1 to 5 were examined, Exs.A1 to A23 were marked. On the side of the defendants, DWs 1 to 4 were examined and Exs.B1 was marked. Ex.X1 was also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to decree the suit as prayed for by the plaintiff. On appeal, the first appellate Court was pleased to set-aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the first defendant, accordingly, dismissed the suit laid by the plaintiff. Aggrieved over the same, the plaintiff has preferred the present second appeal.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

1. Whether the lower appellate Court is right in upholding Ex.A1 when the same had not been proved or established?

2. Whether the lower appellate Court had not misplaced the burden of proof on the appellant, when the obligation to prove Ex.A1 is upon the respondent No.1?

9. It is not in dispute that the first defendant is the son of Thangarasu through his first wife Susila. It is thus seen that the first defendant is the legal heir of Thangarasu, who had died during the year 1989. It is also found that the suit properties originally belonged to Thangarasu and it is also the admitted case of the parties that Thangarasu had executed a settlement deed dated 03.06.1974, in respect of the suit properties in favour of the first defendant, when he was a minor and represented by his mother and the copy of the above said settlement deed has been marked as Ex.A1. However, the plaintiff claiming to be born to Thangarasu through his second wife Nallammal had come forward with the case that the settlement deed dated 03.06.1974 had not been accepted by the plaintiff represented by his mother and accordingly, they did not take possession of the properties comprised therein and enjoy the same pursuant to the said settlement deed and hence, it is contended on behalf of the plaintiff, that the said settlement deed has not come into force, on the ground of non acceptance of the same by the first defendant represented by his mother. Consequently, it is the further case of the plaintiff that Thangarasu had accordingly cancelled the settlement deed Ex.A1, by way of a cancellation deed dated 10.08.1989, marked as Ex.A2 and further, according to the plaintiff, on the same date, Thangarasu had bequeathed the suit properties in favour of the plaintiff by way of a Will marked as Ex.A3 and thus, it is

contended that by way of Ex.A3, it is only the plaintiff, who is having title to the suit properties and according to the plaintiff, as the defendants attempted to interfere with his possession and enjoyment of the suit properties illegally, questioning his title to the same, he has been necessitated to lay the suit for appropriate reliefs.

10. Per contra, it is contended by the first defendant that the settlement deed dated 03.06.1974 had been accepted by him through his mother and accordingly, they had taken possession of the properties comprised therein and enjoying the same and in such view of the matter, the case of the plaintiff that the same had been cancelled by Thangarasu under Ex.A2, as if, the settlement deed had not come into force, is incorrect and legally unsustainable and equally, the first defendant has also questioned the truth and validity of the Will marked as Ex.A3 and according to the first defendant, the above said documents marked as Exs.A2 and A3 had been created by the plaintiff in order to grab the suit properties and thus, according to the first defendant, it is only he, who is the true owner of the suit properties and been in possession and enjoyment of the same and hence, the plaintiff's suit should be dismissed.

11. Considering the rival contentions putforth by the respective parties, it is found that the plaintiff is challenging the settlement deed Ex.A1, only on the footing that it has not been accepted by the first defendant, represented by his mother and as the first defendant represented by his mother, had not taken the possession and enjoyment of the properties comprised therein, it is the case of the plaintiff that the said settlement deed not having been accepted as per law, had not come into force and hence, Thangarasu had all the rights as per law to revoke the said settlement deed and accordingly, he had revoked the same under Ex.A2. However, according to the first defendant, Thangarasu had settled the suit properties in his favour by way of Ex.A1 and accordingly had also handed over the possession and enjoyment of the properties comprised therein to him, represented by his mother and thereby, the settlement deed had been acted upon and as Thangarasu has not reserved any right of revocation in the said deed and also had affirmed that even if he executes the deed of revocation, the same would be invalid and in such view of the matter, according to the first defendant, the settlement deed Ex.A1 remains intact as per law and accordingly, the plaintiff cannot claim any valid claim to the suit properties under Exs.A2 and A3.

12. A perusal of the terms contained in Ex.A1 would go to show that specific recital has been incorporated therein by the settlor that he had handed over the possession of the properties comprised therein to the first defendant represented by his mother for their enjoyment and further, it is also noted that there is a specific recital contained therein whereunder the settlor had firmly stated that he has no power to revoke the

settlement deed and also further firmly stated that even if he revokes the same, it would be an invalid document and all that the settlor had resolved under the said settlement deed is the retention of the patta in respect of the properties comprised therein till his death and nothing more than that and accordingly, it is seen that the settlor Thangarasu did not reserve the right of revocation under Ex.A1 in any manner and when recitals thereunder clearly point out that the possession of properties comprised therein had been handed over to the first defendant, represented by his mother, on the date of settlement deed itself and when it is further seen that the settlee, being the only son of the settlor at that relevant point of time and when it is further seen that the settlor and the settlee represented by his mother and the mother also had been living under the same roof at the relevant point of time and that apart, when it is further seen that the settlee, the first defendant, was a minor at that point of time and the settlement deed had been executed in favour of the minor first defendant represented by his mother the guardian, it is seen that the facts above would only go to show that the settlee had accepted the settlement deed through his mother and accordingly, taken possession of the properties comprised therein and enjoying the same along with the settlor, as they were all living under the same roof at that point of time. Therefore, it is seen that the contention put forth by the plaintiff's counsel that there is no material as such placed on the part of the first defendant to show that he had accepted the settlement deed Ex.A1 and been in possession and enjoyment of the properties comprised therein and therefore sans proof of acceptance, the settlement deed has been rendered invalid, as such, cannot be accepted in any manner.

13. In this connection, it has not been established on the part of the plaintiff that after the settlement deed Ex.A1, it is only Thangarasu who had been in exclusive possession and enjoyment of the properties comprised therein to the exclusion of the plaintiff and his mother till his death. On the other hand, it is seen that, as contained in the pleadings set out by the respective parties and the materials placed, Thangarasu, his wife Susila and the first defendant had been living together till his death. Their relationship has not become sour or strained at any point of time and there is no material to hold that the relationship between the parties above mentioned had not been good or cordial at any point of time, as such. In such view of the matter, it is found that Thangarasu would not be entitled to cancel the settlement deed Ex.A1, by way of the revocation deed marked as Ex.A2.

14. However, it is vehemently argued by the plaintiff's counsel that the proof of acceptance is completely lacking in the present case, hence as per law, this Court should hold that the settlement deed Ex.A1 had not been accepted by the first defendant represented by his mother as there is no material to

evidence the proof of enjoyment of the properties comprised in the settlement deed by the first defendant. It is her contention that the absence of the acceptance of the gift deed is fortified by the said aspects and therefore, according to her, the first appellate Court has erred in non suiting the plaintiff and the same requires interference. In this connection, strong reliance is placed upon the authorities reported in 2001 (2) CTC 277 (R.Jamuna Bai Vs. M.A.Anusuya and 3 others), 2002-2-LW.400 (Muthy Velu and another Vs. G.Kannammal and 4 others) and 2001 (3) CTC 683 (Muthuswami and two others Vs. Palaniswami Gounder and two others). No doubt, in the above said decisions, it has been held that a gift is not valid until it is accepted by the donee. Therefore, it has to be seen whether as held in the above said decisions, the first defendant represented by his mother had not accepted the gift deed Ex.A1 as contended by the plaintiff's counsel, to render it invalid.

15. With reference to the possession and enjoyment of the properties comprised in the settlement deed, as adverted above that subsequent to Ex.A1, there is no material placed on the part of the plaintiff to hold that it is only Thangarasu who had been in exclusive possession and enjoyment of the said properties to the exclusion of the first defendant, the settlee. It is found that as seen above, there is no material placed worth of acceptance that the relationship between Thangarasu and the first defendant had become strained or sour, at any point of time and that they were living separately during the life time of Thangarasu. As above seen, at the time of the execution of Ex.A1, settlement deed, Thangarasu had only one son, namely, the first defendant and accordingly taking into consideration, the care and affection shown to him by his wife Susila and the first defendant and accordingly, taking into consideration all the above said aspects and other factors, out of love and affection towards them, chosen to settle the properties in favour of the minor first defendant represented by his mother under Ex.A1. As the parties thereto had been living together under the same roof at the relevant point of time, it is seen that accordingly, Thangarasu had also handed over the properties settled upon the first defendant then and there and as a corollary to the same, necessary recitals have also been incorporated in the settlement deed that the possession had been handed over to the settlee, on the date of the settlement deed and in such view of the matter, when it is further found that accordingly, the settlor, the settlee and Susila, the mother had been living together under the same roof, it is seen that all were enjoying the properties comprised therein and in such view of the matter, the contention putforth that the settlement deed Ex.A1, had not been accepted by the first defendant, as such, cannot be straightaway countenanced. As above mentioned, there is no material placed to show that the first defendant had been excluded from the possession and enjoyment of the settled properties by Thangarasu at any point of time and that he had separately enjoying the said properties depriving the title of the first defendant to

the same given under Ex.A1, at any point of time. Therefore, it is seen that when the settlement deed itself contains the necessary recitals about the handing over of the suit properties to the settlee and thereby the settlee is found to have accepted the settlement deed explicitly, in such view of the matter, as rightly found by the first appellate Court, in the light of the decision placed before the Courts below reported in 1980 MLJ (II) PP 232-234 (Kasi ammal Vs. Vellai Gounder and another) it is found that the settlement deed had been accepted by the first defendant and hence, there is no question of revoking the same by the settlor subsequent thereto.

16. In this connection, it has to be noted that there is no material as such also placed by the plaintiff that he had been in possession and enjoyment of the suit properties as true owner thereof following Exs.A2 and A3. The kist receipts and the house tax receipts, projected by the plaintiff on his side marked as Exs.A4 to A18 are shown to have come into existence after the institution of the suit, as could be seen from the evidence of the plaintiff's mother examined as PW1. In this connection, PW1, during the course of cross examination has admitted that the document marked as Exs.A5 to A18 are all obtained after the institution of the suit. Therefore, it is seen that there is no material at all also on the part of the plaintiff to show that he has been in possession and enjoyment of the suit properties as the lawful owner and therefore, the plaintiff cannot claim to be in lawful possession and enjoyment of the suit properties on the basis of the materials placed by him.

17. Now coming to the position, as to whether the mentioning of handing over possession in Ex.A1, itself is sufficient to come to the conclusion that the settlement deed has been acted upon, it is seen that with reference to the facts and circumstances of the case at hand as to the acceptance of the settlement deed by the settlee, the position of law has been expatiated by the Apex Court in the decision reported in (2008) 1 MLJ 193 (SC) (Asokan Vs. Lakshmikutty) as follows:

"16. While determining the question as to whether delivery of possession would constitute acceptance of a gift or not, the relationship between the parties plays an important role. It is not a case that the appellant was not aware of the recitals contained in deeds of gift. The very fact that the defendants contend that the donee was to perform certain obligations, is itself indicative of the fact that the parties were aware thereof. Even a silence may sometime indicate acceptance. It is not necessary to prove any overt act in respect thereof as an express acceptance is not necessary for completing the transaction of gift.

...

18. Mr. Iyer, however, submitted that it would be open to the donors to prove that in fact no possession had been handed over. Strong reliance in this behalf has been placed on S.V.S. Muhammad Yusuf Rowther and another v. Muhammad Yusuf Rowther and other [AIR 1958 Madras 527] and Alavi v. Aminakutty & Others [1984 KLT 61 (NOC)].

....

20. When a registered document is executed and the executors are aware of the terms and nature of the document, a presumption arises in regard to the correctness thereof. [See Prem Singh and Ors. v. Birbal and Ors. (2006) 5 SCC 353]. When such a presumption is raised coupled with the recitals in regard to putting the donee in possession of the property, the onus should be on the donor and not on the donee".

Similarly the mere factum of non delivery of possession of the settled properties by itself would not render the document as invalid has also been explained by this Court in the decision reported in (2008) 1 MLJ 227 (N.Subramanian Vs. Thanjiammal and another) as follows:

"16. Under Section 123 of the Transfer of Property Act, a gift of immovable property should be made by a registered instrument signed by or on behalf of the donor and attested at least by a two witnesses and the second requirement is there must be acceptance of the gift by the donee. The delivery of possession is not necessary and Section 123 does away with the necessity of delivery of possession even it was required by the strict Hindu Law, in the case of a registered instrument of gift properly executed and attested. The above said legal principle has been laid down in 1997 (I) CTC 256 (referred to supra). Therefore the finding of the trial court that the settlement deed executed by Thanjiammal in favour of Pachiammal is sham and nominal and it has not been acted upon since possession has not been handed over to Pachiammal is erroneous.

and also the above said position is reiterated in the decision reported in 2009 (5) CTC 558 (S.Ganesan Vs. Bharathirajan) following the decision of the Supreme Court reported in 2004 (1) CTC 146 (SC) (K.Balakrishnan Vs. K.Kalam and others)

whereunder it has been held that the settlement deed would not be invalidated on the ground that the possession was not handed over to the donee or because the donee had failed to make mutation in respect of the properties settled in her favour.

18. Following the above said principles, in the decision reported in 2011-5-LW 553 (1. K.A.Shanmugam, 2. K.Sengodan Vs. Tamilarasi and two others), this Court has held that the mentioning of the handing over of the possession of the settlement deed itself is sufficient to come to the conclusion that the settlement deed has been acted upon and the non transfer of the name of the donee in the revenue records immediately after the settlement deed has no significance because after the execution of the settlement deed by the mother in favour of her daughters both of them were residing in the same property.

19. The above principles as regards the settlement deed also are similar to the facts of the present case. As above discussed, in Ex.A1 there is a clear recital as to the handing over of the possession of the property to the first defendant represented by his mother and in such view of the matter, the mere failure on the part of the first defendant to mutate his name in the revenue records in the properties by itself would not render the settlement deed invalid as at the relevant point of time and furthermore, the settlee being the only son of the settlor and as the settlor, settlee the mother Susila were all residing in the same roof, it is found that the failure of the non transfer of the revenue records in favour of the first defendant would assume no significance.

20. Further, our High Court in the decision rendered in W.P. (MD) No.10493 and 10535 of 2013 dated 05.08.2016, (Santha Suresh and Ors. Vs. The Sub Registrar, Kodaikanal and Ors.) has held following various decisions, that the settlement deed once executed cannot be set at naught unilaterally by the settlor and the only course open to a party is to approach the Civil Court for appropriate reliefs and accordingly, further held that the cancellation deeds cannot be maintained in law and accordingly, quashed the cancellation deeds in the concerned case, by giving a direction to the Sub Registrar concerned to delete the entries relating to the registration of the unilateral cancellation deeds.

21. In the light of the above decisions, when considering the facts and circumstances of the present case and the materials placed and in the light of the principles of law adumbrated in the various decisions of the Apex Court and our High Court, it is found that applying the same

to the case at hand, the determination of the first appellate Court that Ex.A1 settlement deed had been accepted by the first

defendant represented by his mother and accordingly, had been in possession and enjoyment of the properties settled, right from the date of the settlement deed, does not call for any interference. In such view of the matter, it is found that the settlor had no authority or power as per law, to cancel the settlement deed unilaterally and even if such a cancellation deed had been executed as Ex.A2, in the present case, it is found that the said cancellation deed would have no legal effect and it could only be termed as an invalid document and not binding upon the settlee in any manner. As above seen, in so far as this case is concerned, the settlor Thangarasu has not reserved any right of revocation under the settlement deed and once he had chosen to settle the property absolutely to the first defendant and also handed over the possession of the same to be enjoyed by the settlee, it is found that the settlor cannot thereafter revoke the same and accordingly, it is seen that the settlor had also incorporated necessary recitals in the settlement deed as above referred to. Further, the mere fact that the settlor had retained the patta in respect of the properties settled under Ex.A1, till his life time, by itself would not entitle the settlor to revoke the settlement deed.

22. Considering the reasons given in Ex.A2 revocation deed, still it is found that as per the above said authoritative pronouncements of the Supreme Court and our High Court, it is seen that after the execution of the settlement deed, the settlor cannot revoke the deed on any account, as the settlor ceases to have any right over the settled property after the execution of the settlement and in such view of the matter also, it is found that the cancellation deed Ex.A2 is invalid and not binding upon the first defendant, the settlee.

23. Further, it is also noted that the Transfer of Property Act also provides for as to when the settlement deed may be suspended or revoked and the contingencies under which the settlement deed may be suspended or revoked are incorporated under Section 126 of the Transfer of Property Act. A reading of Section 126 of the Transfer of Property Act would go to show that except as provided thereunder a gift cannot be revoked. It is found that the conditions specified thereunder for suspension or revocation of the settlement deed/gift deed, not found applicable to the present case and also such conditions had not been incorporated in the settlement deed Ex.A1, it is found that the settlement deed Ex.A1 cannot be revoked as per law. As already been determined, the settlement deed Ex.A1 had been accepted and acted upon by the first defendant.

24. In the light of the above discussions, it is found that the first appellate Court has rightly approached the matter in the right perspective and accordingly, found that Ex.A1 had been amply proved and established to be a valid document and the

first appellate Court has not misplaced the burden of proof on the plaintiff for upholding the validity of the Ex.A1. Accordingly, the substantial questions of law formulated in this second appeal are answered.

25. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(co)

//True Copy//

Sub Assistant Registrar

sli

To

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

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+1cc to Mr.V.Raghavachari, Advocate Sr.No.3945
+1cc to Mr.R.N.Kothandaraman, Advocate Sr.No.4551

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