

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 27.03.2019

Delivered on: 05.04.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.Nos.142 and 143 of 1999

Nanjammal (Died)

1.Kuppusamy (Deceased)

2.Nagarajan

3.Velusamy

4.Velumani

..Appellants 1 to 4 /Legal heirs of
Nanjammal (died) - Cause title
accepted vide Order dt:05/02/1999
in CMP.Nos.1849/1999 & 1850/1999

5.K.Janabai

6.Kavitha

7.Divya

8.Senthilkumar

9.Roobeshkumar

..Appellants 5 to 9 in both S.As.

(Appellants 5 to 9 are brought on
record as Lrs of the deceased, first
appellant vide order of Court dated
30.09.2008 made in CMP.Nos.1385
& 1443/2008 in S.A.Nos.142 & 143/1999)

Vs.

1.K.Palanisamy (Died)

2.P.Sornam

3.P.Mohan

4.Bagyalakshmi

5.Janaki

6.P.Jaganathan

7.Manjula

8.Amutha

9.P.Radhakrishnan

...Respondents in both S.As.

(Respondents 2 to 9 are brought
on record as Lrs of the deceased sole respondent
vide Order of Court dated 28.08.2008 made in
CMP.Nos.14080 & 14081/1991 in S.A.Nos.
142 & 143/1999)

PRAYER in S.A.No.142 of 1999: Second Appeal filed under Section
100 of C.P.C., against the judgment and decree dated 29.06.1998

made in A.S.No.147/1994 on the file of the II Additional District Court, Coimbatore, reversing the judgment and decree dated 11.03.1994 made in O.S.No.1866/1985 III Additional District Munsif Court, Coimbatore.

PRAYER in S.A.No.143 of 1999: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 29.06.1998 made in A.S.No.145/1994 on the file of the II Additional District Court, Coimbatore, reversing the judgment and decree dated 11.03.1994 made in O.S.No.858/1987 III Additional District Munsif Court, Coimbatore.

For Appellants in
both S.As. : Mr.S.Parthasarathy
Senior Counsel
for Mr.V.Anand

For Respondents in
both S.As. : Mr.S.Sounthar, Amicus

COMMON JUDGMENT

(a) S.A.No.142 of 1999 has been filed by the legal representatives of the plaintiff namely K.Muthuswami in O.S.No.1866 of 1985 against the judgment and decree passed by the II Additional District Judge, Coimbatore, in A.S.No.147 of 1994 dated 29.06.1998 reversing the judgment and decree passed by the III Additional District Munsif, Coimbatore in O.S.No.1866 of 1985 dated 11.03.1994.

(b) S.A.No.143 of 1994 also has been filed by the legal representatives of K.Muthuswami, who was the defendnat in O.S.No.858 of 1987 against the judgment and decree passed by the II Additional District Judge, Coimbatore in A.S.No.145 of 1994 dated 29.06.1998 reversing the judgment and decree passed by the III Additional District Munsif, Coimbatore in O.S.No.858 of 1987 dated 11.03.1994.

2. One K.Muthuswami had filed a suit in O.S.No.1866 of 1985 on the file of the III Additional District Munsif, Coimbatore against one K.Palaniswami and K.Chinnammal for declaration that he is the owner of half share in the suit property and entitled to seek and obtain partition by metes and bounds on the demise of the second defendant and for permanent injunction restraining the defendants therein from alienating or encumbering or deal with his half share in the suit property. The said K.Chinnammal and K.Palaniswami had filed a suit against the said K.Muthuswami in O.S.No.858 of 1987 on the file of the III Additional District Munsif, Coimbatore for permanent injunction restraining the defendant therein, his men, etc., from interfering with their right and enjoyment of the suit property. The learned

Additional District Munsif, Coimbatore had tried both the suits jointly and by the common judgment dated 11.03.1994 had decreed the suit in O.S.No.1866 of 1985 as prayed for, however, he dismissed the suit in O.S.No.858 of 1987. Aggrieved by the same, the said K.Palaniswami had filed an appeal in A.S.No.147 of 1994 on the file of the II Additional District Judge, Coimbatore, against the judgment and decree passed in O.S.No.1866 of 1985. He also filed an appeal in A.S.No.145 of 1994 on the file of the II Additional District Judge, Coimbatore, against the judgment and decree passed in O.S.No.858 of 1987. During pendency of the aforesaid appeals, the said K.Muthuswami died and hence, his legal representatives have been impleaded as respondents 3 to 7 before the first Appellate Court.

3. The learned II Additional District Judge, Coimbatore, by the common judgment dated 29.06.1998 had allowed both the appeals and set aside the judgment and decree passed by the trial Court and dismissed the suit in O.S.No.1866 of 1985, however, he decreed the suit in O.S.No.858 of 1987. Feeling aggrieved, the legal representatives of the said K.Muthuswami have filed the present second appeals. For the sake of convenience, the parties are referred to as described in O.S.No.1866 of 1985.

4. The averments made in the plaint in O.S.No.1866 of 1985 are in brief as follows:-

(a) The plaintiff and the first defendant are brothers. The second defendant is their sister. The plaintiff and the first defendant had jointly purchased the suit property as a vacant site under a registered sale deed dated 11.09.1952 and subsequently, they had constructed the buildings therein. On 12.11.1959, the plaintiff and the first defendant had mortgaged the suit property to one Chellammal by executing a registered mortgage deed. The property tax for the suit property has been assessed in the name of the plaintiff. The plaintiff and the first defendant are living in two separate portions and the front portions were let out to the tenants. The rent has been collected by either of the brothers and divided between them.

(b) The second defendant became a widow before 1939. She had no issues. She was living with her brothers in turns. In 1961, there emanated a great quarrel amongst the female folks and the second defendant got out of the home in a huff. Her complaint was that she was dubbed and abused as a destitute. The affectionate brothers apologised for the abuse of their female folks and assured to take care and confer a right of enjoyment of the suit property for her life to safeguard her future and for a contingency of her brothers predeceasing her. A deed of settlement dated 27.10.1961 conferring a right of enjoyment for life without the power of alienation was executed and delivered to her. Nevertheless, the plaintiff and the first defendant

continued to live in their respective portions of the suit property and collected and enjoyed the rent from other portions as ever before. The second defendant was appeased and taken care of. The plaintiff and the first defendant discharged the mortgage liability over the property. The plaintiff was paying the taxes for the property until about 1983.

(C) The second defendant has become old and she is an illiterate. She is now held by the first defendant under his away, influence and domination. The first defendant was in urgent need of funds and tried to alienate the property. On coming to know of the same, the plaintiff questioned and objected to the same. The first defendant thereupon began to assert that he alone is entitled to the entire property after the life time of the second defendant and therefore they are entitled to sell the entire property. The plaintiff is an equal owner. He never gave up his rights. There was no need or any talk in that direction. In the original settlement deed dated 27.10.1961, it is clearly and categorically recited and written as "உங்கள் ஜீவ திசைக்கு பின் கீழ்க்கண்ட சொத்து எங்களில் 1, 2 லக்கமிட்டருக்கு சர்வ சுதந்திரமாய் சேர வேண்டியது."

(d) The second defendant is holding the original settlement deed and when it is produced, it would categorically show that both the plaintiff and the first defendant are to take the entire suit property after the life time of the second defendant. At the instigation of the first defendant the second defendant refused to show the settlement. The defendants are conniving together to defeat the rights of the plaintiff. The plaintiff never agreed nor ever had any intention to give up his right or share in the suit property. For that matter, the plaintiff is not rich. He has no other property. He had a larger family with 4 sons and a daughter. Even after the settlement, the plaintiff always asserted his right. Since the defendants are trying to alienate the suit property the plaintiff was constrained to file the suit for declaration and permanent injunction.

5. The averments made in the written statement filed by the defendants 1 and 2 in O.S.No.1866 of 1985 are in brief as follows:-

(a) It is false to allege that the plaintiff and the first defendant jointly purchased the suit property as a vacant site on 11.09.1952 and subsequently they had constructed the buildings therein. In the year 1952, the plaintiff had no means to contribute anything to purchase the suit property. He was employed in the Military Camp at that time and that his monthly income was not even suffice for the maintenance of his family. These defendants out of their own funds by prizing the chits subscribed with the Finance Company and with their earnings and savings made out of the masonry contract works purchased the

suit site on 11.09.1952. Subsequently the defendants constructed the buildings in the suit site in or about the year 1954. Out of love and sympathy and since the plaintiff being the elder, his name was also included in the said sale deed just to console him because he was deserted by his wife at that time.

(b) Since the sale deed stands in the name of the plaintiff and the first defendant, the plaintiff was also joined in the mortgage deed when it was executed in favour of one Chellammal in the year 1959, but the whole mortgage was discharged by the first defendant out of his own earnings. Since the plaintiff is not in an affluent position and out of mercy and sympathy he was allowed to occupy a portion of the suit property and consequently, he is residing in a portion of the suit property. It is false to allege that the rent was collected by either of the brothers and divided among themselves. It is false to state that in the year 1961 there was a great quarrel among the female folks and hence, the plaintiff and the first defendant had executed the settlement deed dated 27.10.1961 in favour of the second defendant. The said settlement deed was executed under the different circumstances altogether. It is false to state that the plaintiff is an equal owner. He has given up his right if any in the suit property. The recitals of the settlement deed dated 27.10.1961 will clinches the matter in detail and clearly binding on the plaintiff. It is false to state that the second defendant is holding the original settlement deed and that at the instigation of the first defendant she is refusing to show the same. The discharged mortgage deed as well as the original settlement deed dated 27.10.1961 were stealthily taken away by the plaintiff from the custody of the second defendant just six months prior to the filing of the suit and that after doing so, the plaintiff was claiming half right over the suit property and insisting these defendants to cancel the said document which was rightly refused by them. Aggrieved at this, the plaintiff with the help of his sons indulged in violent activities with the first defendant and caused bodily injuries resulting in police complaint and investigation and warnings. Since the plaintiff had failed in his unlawful attempt he had come forward with the above vexations suit with false and imaginary grounds. The original settlement is now available only with the plaintiff and with a view to controvert the implications of the same the plaintiff has secreted the same and throwing the burden falsely upon the second defendant.

(C) Considering the constant help being given by the second defendant in purchasing the suit property and in constructing the houses therein and in educating and bringing up the children of the plaintiff by exertion and money, earnings and savings of the second defendant and that since she had lost her husband and no issues, the first defendant decided to settle the suit property to the second defendant for her life enjoyment and

for which the plaintiff also conceded because he had not contributed anything to the suit property. Accordingly the settlement deed dated 27.10.1961 was executed in favour of the second defendant by the first defendant and the plaintiff. It was done out of free will, own volition and without any undue influence whatsoever. The recitals of the said document are true and clearly binding. The said document was acted upon and the second defendant is collecting the rent from the tenants. As per the said document, after the life time of the second defendant, the suit property has to come to the first defendant and he can enjoy the same as absolute owner. It is false to allege that the first defendant is in dire need of money and to achieve the same, he is trying to alienate the suit property in collusion with the second defendant. Having settled the suit property in favour of the defendants, the suit as framed is not at all maintainable and therefore, the defendants prayed to dismiss the suit.

6. The defendants in O.S.No.1866 of 1985 namely, K.Palaniswami and K.Chinnammal had filed a suit in O.S.No.858 of 1987 on the file of the III Additional District Munsif, Coimbatore against the said K.Muthuswami alleging that the said K.Muthuswami not allowing them to enjoy the suit property peacefully and hence, he has to be restrained by means of permanent injunction.

7. The said K.Muthuswami, who is the defendant in the said suit had filed a written statement denying the allegations made in the plaint. According to him, he is entitled to half share in the suit property and he is also in possession of the suit property and therefore, he prayed to dismiss the said suit.

8. Based on the aforesaid pleadings, the learned III Additional District Munsif, Coimbatore, had framed necessary issues and tried both the suits jointly. During trial, the evidence was recorded in O.S.No.1866 of 1985 and the same has been treated as evidence in O.S.No.858 of 1987 also. The plaintiff in O.S.No.1866 of 1985 and the defendant in O.S.No.858 of 1987 namely, K.Muthuswami was examined as PW1. Exs.A1 to Ex.A11 were marked as exhibits on the side of the plaintiff. The first defendant in O.S.No.1866 of 1985 and the second defendant in O.S.No.858 of 1987 namely, K.Palaniswami was examined as DW1 and on their side, Exs.B1 to Ex.B39 were marked as exhibits.

9. The learned III Additional District Munsif, Coimbatore, after considering the materials placed before him found that the original settlement deed dated 27.10.1961 must be only with the defendants and in the said document there must be a recital that after the life time of the said K.Chinnammal, the property should go to the plaintiff K.Muthuswami and the first defendant K.Palaniswami and that is why they have not produced the said

document before the Court and accordingly, he held that an adverse inference has to be drawn against the defendants. He further found that the plaintiff is also in possession of the suit property and accordingly, he decreed the suit in O.S.No.1866 of 1985 as prayed for and dismiss the suit in O.S.No.858 of 1987. Aggrieved by the same, the first defendant in O.S.No.1866 of 1985 and the second plaintiff in O.S.No.858 of 1985 namely, K.Palaniswami had filed appeals in A.S.Nos. 147 of 1994 and 145 of 1994 respectively, on the file of the II Additional District Judge, Coimbatore. During pendency of the said appeals before the first Appellate Court, the plaintiff K.Muthuswami died and hence his Legal Representatives have been impleaded as respondents 3 to 7 in the said appeals. The II Additional District Judge, Coimbatore by the judgment dated 29.06.1998 had allowed both the appeals and set aside the judgment and decree passed by the trial Court and dismiss the suit in O.S.No.1866 of 1985 and decreed the suit in O.S.No.858 of 1987. Feeling aggrieved, the legal representatives of the said K.Muthuswami have filed the present Second Appeals.

10. This Court, at the time of admitting the second appeals has formulated the following the substantial questions of law:-

"1. Whether the lower Appellate Court is right in its construction, reading and legal effect of Ex.B39 settlement deed and is holding gift and transfer is created in favour of without following the principles laid down in 1991 (2) SCC 188?

2. When there is an apparent mistake in Ex.B39 as regards omission of 1 in Ex.B39, whether the lower Appellate Court is right in law in not considering the document as a whole and in not considering the intention of the parties and the surrounding circumstances and pleadings of the respective parties in construing the legal effect and rights of parties under Ex.B39 vide - 1991 (2) SCC 180 and 1998 2 L.W. 185.

3. Whether the lower Appellate Court is right in law in misreading the case of the appellants and in assuming that the father of the appellants claim right under Ex.B39 settlement deed and hence the burden is on him to establish how Ex.B39 confers right to him, overlooking the fact that the father of the appellants claim title only under Ex.A2 sale deed and Ex.B39 settlement deed was pleaded only to show only the restricted right of enjoyment till life time was conferred to the sister of the respondent and father of the appellants?"

11. Though notices have been served on the respondents and their names also printed in the cause list, they have not appeared either in person or through counsel. Hence, this Court by the order dated 31.01.2019 has appointed Mr.S.Soundar, Advocate as amicus to assist the Court in both the Second appeals.

12. Heard Mr.S.Parthasarathy, learned Senior Counsel assisted by Mr.V.Anand, learned counsel for the appellants and Mr.S.Soundar, learned Amicus.

13. Substantial questions of law 1 to 3 :

The learned Senior Counsel for the appellants has submitted that the first Appellate Court erred in reversing the well considered judgment of the trial Court. He further submitted that the first Appellate Court failed to consider that the suit property was purchased as a vacant site by the father of the appellants namely, K.Muthuswami and the first respondent namely, K.Palaniswami under Ex.A2 sale deed dated 11.09.1952 and subsequently, both of them jointly constructed the buildings therein. He further submitted that the settlement deed dated 27.10.1961 was executed by the said K.Muthuswami and K.Palaniswami in favour of their sister namely, K.Chinnammal only with a view to provide maintenance till her life time and the parties never intended that after the life time of the said K.Chinnammal, the suit property should go to one of the settlors namely, K.Palaniswami alone. He further submitted that if really the said K.Muthuswami had any intention to relinquish his right over the suit property, he would have clearly mentioned the said intention in unequivocal words in the said document. He further submitted that when the said K.Muthuswami and K.Palaniswami had intended primarily to give the suit property for maintenance to their sister K.Chinnammal, the contention of the said K.Palaniswami that his brother K.Muthuswami had relinquished his right over the suit property altogether in favour of him is not acceptable. He further submitted that in the original settlement deed dated 27.10.1961, it has been clearly stated that after the death of K.Chinnammal, the suit property should come back to both the settlors but the defendants had purposely withheld the original settlement deed and hence, an adverse inference has to be drawn against them. He further submitted that admittedly even after executing the settlement deed dated 27.10.1961 in favour of K.Chinnammal, the said K.Muthuswami and K.Palaniswami continue to be in possession of the suit property and that itself would show that the settlement deed dated 27.10.1961 was not acted upon.

14. The learned Senior Counsel for the appellants has further submitted that if really the said K.Muthuswami had relinquished his right under the settlement deed dated 27.10.1961, the said K.Palaniswami and K.Chinnammal would not

have allowed the said K.Muthuswami to join with them to mortgage the suit property in favour of one Kaliammal under Ex.A7 mortgage deed dated 02.07.1970. He further submitted that the aforesaid mortgage was discharged by K.Muthuswami and got Ex.A8 receipt. He further submitted that in the said settlement deed, it is clearly stated that even after execution of the said document the house tax for the suit property shall continue in the name of the settlors and they will pay the tax for the suit property and accordingly the said K.Muthuswami had paid house tax till filing of the suit and the said fact also would show that the said settlement deed did not come into force. He further submitted that the said K.Muthuswami is not a rich man and he is not having any other property and in such a case, he would not have relinquished his right over the suit property in favour of his brother K.Palaniswami under the settlement deed dated 27.10.1961. He further submitted that in the registration copy of the said document, while writing the recitals instead of mentioning that after the life time of K.Chinnammal, the property should come back to the persons mentioned as Sl.Nos.1 and 2, it has been mistakenly mentioned as Sl.No.2 alone.

15. He further submitted that while interpreting the document, the Court has to see the conducts of the parties before and after the said document. He further submitted that the conduct of the parties would show that the said K.Muthuswami had no intention to relinquish his right over the suit property in favour of his brother K.Palaniswami. He further submitted that the trial Court after taking into consideration of all the aforesaid facts, has rightly decreed the suit which was filed by the said K.Muthuswami and dismissed the suit which was filed by the said K.Palaniswami and K.Chinnammal, but the first Appellate Court without considering the evidence in proper prospective, has reversed the well considered judgment of the trial Court and dismissed the suit which was filed by the said K.Muthuswami and decreed the suit which was filed by the K.Palaniswami and K.Chinnammal and therefore, he prayed to allow these second appeals and set aside the judgment and decree passed by the first Appellate Court and restore the judgment and decree passed by the trial Court.

16. The learned Senior Counsel for the appellants, in support of the aforesaid contentions, relied upon the following decisions:-

1) Puran Singh Shani Vs. Sundar Bhagwandas Kripalani (SMT) and others, (1991) 2 SCC 180.

2) Sooriyamurthy and 3 others Vs. Chinnaswamy(Died) and 7 others, 1998-2-L.W.178.

3) Gopal Krishna Ketkar Vs.Mohamed Haji Latiff, AIR 1968 SC 1413.

17. Per contra, Mr.S.Soundar, learned Amicus has submitted that when the plaintiff is questioning the recitals found in the settlement deed dated 27.10.1961, he has not given any explanation for not producing even a registration copy of the said settlement deed. He further submitted that it is only the defendants, who have produced a registration copy of the said settlement deed and marked as Ex.B39 and a perusal of the said document would clearly show that after the death of K.Chinnammal, the property should come back to the person mentioned as No.2 namely, K.Palaniswami.

18. He further submitted that since the sale deed in respect of the suit property stood in the name of the plaintiff and the first defendant, in Ex.A7 mortgage deed, the plaintiff was also shown as mortgagor. He further submitted that evidence of DW1 would show that the said mortgage was discharged by the first defendant alone and Ex.A8 receipt was received by him but the said receipt and the original settlement deed have been taken away by the plaintiff. He further submitted that the judgment of the first Appellate Court would show that the first Appellate Court Judge has summoned the Registrar from the Sub Registrar Office concerned and compared with Ex.B39 and found that there was no discrepancy in between Ex.B39 and the document maintained by the Sub Registrar. He further submitted that since Ex.B39 has been issued by the Sub Registrar, as certified copy, the genuineness of the said document cannot be doubted. He further submitted that in Ex.B39 it is clearly stated that after the life time of K.Chinnammal the property should come back to K.Palaniswami and thereafter a clause has been added to the effect that the property tax should continue in the name of the settlors and they will pay the tax and the said recitals will not take away the grant already made by the plaintiff.

19. He further submitted that once properties are gifted absolutely, the subsequent restriction made in the said document has to be ignored. He further submitted that the trial Court without considering the aforesaid facts, in proper prospective had decreed the suit which was filed by the said K.Muthuswami and dismissed the suit which was filed by the said K.Palaniswami but the first Appellate Court has rightly appreciated the evidence in proper prospective and dismissed the suit which was filed by the said K.Muthuswami and decreed the suit which was filed by the said K.Palaniswami and K.Chinnammal and in the said factual findings, this Court cannot interfere.

20. In support of the aforesaid contentions, the learned Amicus, has relied upon the following decisions:-

1) Sahebzada Mohammad Kamgarh shah Vs. Jagdish Chandra Deo Dhabal Deband others, AIR 1960 SC 953.

2) Ramkishorelal and another Vs. Kamal Narayan, AIR 1963 SC 890.

3) Uma Devi Nambiar and others Vs. T.C.Sidhan (Dead), (2004) 2 SCC 321.

21. It is an admitted fact that the plaintiff (K.Muthuswami) and the first defendant (K.Palaniswami) are brothers and the second defendant (K.Chinnammal) is their sister. It is also an admitted fact that they had lost their parents at their tender age, the second defendant K.Chinnammal had lost her husband at her young age and she had no issues and stayed with the first defendant's family till her death.

22. According to the plaintiff, the suit property was purchased by him and his brother (first defendant) under a registered sale deed dated 11.09.1952 for a sum of Rs.2,000/- and subsequently they had jointly constructed the buildings therein. His further case is that since their sister (second defendant) became a widow before the year 1939 and she had no issues, she was living with them in turns. His further case is that in the year 1961, there was a quarrel amongst the female folks and hence, the second defendant got out of the home in a huff. His further case is that the affectionate brothers apologised for the abuse of their members and to console her, they have executed a registered settlement deed dated 27.10.1961 in favour of the second defendant conferring a right of enjoyment till her life time, without any power of alienation and after her life time, the property should come back to him and his brother (first defendant) but in the registration copy of the said settlement deed, mistakenly it has been mentioned that after the life time of the second defendant, the property should come back to the first defendant alone.

23. His further case is that in the original settlement deed, it has been clearly mentioned that after the life time of the second defendant, both the settlors viz., himself and the first defendant are entitled to enjoy the property as absolute owners. His further case is that the said original settlement deed was entrusted with the second defendant and she refused to produce the same, at the instigation of the first defendant and if the original settlement deed is produced that would reveal the true facts.

24. The case of the defendants is that the plaintiff was employed in the Military Campus at that time and that his monthly income was not even suffice for running his family. Their further case is that out of their own funds by prizing the chits subscribed with the Finance Company and with their earnings and savings made out of the masonry contract works, they have purchased the suit site. Their further case is that the plaintiff has not paid any amount for purchasing the suit site. Their further case is that they only constructed the suit

house at a huge cost in or about the year 1954 and the plaintiff has not spent a single pie either towards the purchase or construction of the houses.

25. Their further case is that out of love and sympathy and since the plaintiff being elder, his name was also included in the sale deed, just to console him because he was deserted by his wife at that time. Their further case is that considering the constant help being given by the second defendant in purchasing the suit property and in constructing the houses by the first defendant, and in educating and bringing up the children of the plaintiff by exertion and money, earnings and savings of the second defendant and that since she had lost her husband and had no issues, the first defendant decided to settle the suit property on the second defendant for her life enjoyment and for which the plaintiff also conceded, because she had not contributed anything to the suit property and accordingly the settlement deed dated 27.10.1961 was executed in favour of the second defendant with a recital that after her life time, the first defendant has to take the same as an absolute owner. Their further case is that the plaintiff has stealthily taken away the original settlement deed along with other documents from the custody of the second defendant just six months prior to the filing of the suit and therefore, the original settlement deed is only with the plaintiff.

26. A registration copy of the sale deed dated 11.09.1952 has been produced and marked as Ex.A2. A perusal of the said document shows that the plaintiff and the first defendant had jointly purchased the suit site for a sum of Rs.2,000/-. Though the defendants have taken a plea in the written statement that they have purchased the suit site out of their own funds by prizing the chits subscribed with the Finance Company and also with their earnings and savings made out of the masonry contract works, they have not produced any documentary evidence to substantiate the aforesaid plea. Further, the defendants have stated in their written statement that after the purchase they constructed the buildings by obtaining necessary plan and licence from the Municipality, but, they have not produced any such documents before the Court.

27. Though the defendants have produced certain documents to show that the first defendant was doing contract work, the persons mentioned in the said documents have not been examined before the Court and proved the said documents. Under the said circumstances, no reliance can be placed upon the said documents. It is for the defendants to prove that they had purchased the suit sites and constructed the buildings therein, and the plaintiff was only a name lender and he has not contributed anything for purchasing the site and for construction. Since the sale deed stands in the name of the plaintiff and the first defendant, it has to be presumed, unless

it is contrarily proved, that the plaintiff and the first defendant had purchased the suit site.

28. It is also to be pointed out that according to the defendants only out of love and sympathy and since the plaintiff being the elder, his name was also included in the said sale deed just to console him because the plaintiff was deserted by his wife at that time. With regard to the aforesaid contention also absolutely there is no evidence. Further, according to the defendants, the second defendant also contributed for purchasing the suit site. If really she also contributed money for purchasing the suit site, her name also would have been shown as purchaser, in the sale deed. There is no explanation from the defendants as to why her name has not been included in the said deed. Therefore, the contention of the defendants that they only purchased the suit site and only out of love and affection, the plaintiff's name has been included in Ex.A2 sale deed cannot be accepted.

29. The plaintiff has stated in his plaint that in the original settlement deed dated 27.10.1961 it is clearly and categorically recited and written as "உங்கள் ஜீவ திசைக்கு பின் கீழ்க்கண்ட சொத்து எங்களில் 1, 2 லக்கமிட்டருக்கு சர்வ சுதந்திரமாய் சேர வேண்டியது." He further stated that the original settlement deed is with the second defendant and if she produced the same, it would show that both the plaintiff and the first defendant are entitled to take back the suit property after the life time of the second defendant, but at the instigation of the first defendant, the second defendant refused to show the said original settlement deed.

30. The defendants contended that in the original settlement deed, it is clearly stated that after the life time of the second defendant, it is only the first defendant has to take the suit property and enjoy the same as an absolute owner. Their further contention is that the plaintiff has stealthily taken the said original settlement deed along with other documents just six months prior to the filing of the suit and hence, the said document is only with him. Any how, the original settlement deed dated 27.10.1961 has not been produced before the Court either by the plaintiff or by the defendants. There is no evidence that the said original settlement deed is only with the second defendant and she is purposely withholding the said document. Likewise, for the contention of the defendants that the plaintiff has taken away the original settlement deed also there is no evidence. Any how a registration copy of the said settlement deed has been produced and marked as Ex.B39.

31. As per sub Section (2) of Section 74 of the Indian Evidence Act, the public records kept in any state of private documents are also public documents. As per Section 76 of the Indian Evidence Act, every public officer having the custody of a public document, shall give a certified copy on demand to any

person. As per Section 77 of the Indian Evidence Act, such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

32. Under Section 79 of the Indian Evidence Act, the Court shall presume to be genuine every document purporting to be a certified copy which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Central Government or of a State Government.

33. In this case, Ex.B39 has been duly certified by the Sub Registrar as true copy and as such, in view of the aforesaid provisions of the Indian Evidence Act, the Court shall presume the genuineness and the contents of Ex.B39. Further, it is seen from the first Appellate Court judgment that the first Appellate Court Judge had sent for the concerned Register from the office of the Sub-Registrar and he compared with the said Register and found that there was no discrepancy between Ex.B39 and the Register which is maintained by the Sub Registrar, with regard to the recitals. Therefore, the contention of the plaintiff that the original settlement deed contains the recital that "உங்கள் ஜீவ திசைக்கு பின் கீழ்க்கண்ட சொத்து எங்களில் 1, 2 லக்கமிட்டருக்கு சர்வ சுதந்திரமாய் சேர வேண்டியது". but in the certified copy of the settlement deed, Serial No.1 has been omitted cannot be accepted. However, the attendant circumstances of the case and the subsequent conduct of the parties would lead to an inference that a mistake has crept in the original settlement deed itself.

34. A perusal of Ex.B39 would show that the main intention of the settlors was to make a provision for maintenance for their sister (second defendant) because she is a widow and not having any issues. If really the plaintiff had an intention to give up his right over the suit property, he would have mentioned the reason for the same. In the said document no reason has been stated as to why, after the life time of the second defendant, the property should go to the person who has been mentioned as No.2 alone. When a reason is given for settling the property in favour of the second defendant by giving life estate, normally a reason will be expected for relinquishing the right by the plaintiff in favour of the first defendant. Absolutely there is no reason, what so ever, mentioned in the said document for relinquishing the right by the plaintiff in favour of the first defendant. Not even a slight indication made in the said document as to why the plaintiff has released his right in favour of his brother (first defendant).

35. It is also to be pointed out that the plaintiff has stated in his plaint that he is not rich and he is not having any other property to relinquish his right over the suit

property and the said averments have not been denied by the defendants. So, it is clear that the suit property is only property to the family of both the parties. Further, it is not the case of the defendants that the plaintiff is an affluent person. Under, in the said circumstances, the contention of the defendants that the plaintiff has voluntarily relinquished his right over the suit property cannot be accepted.

36. It is also to be pointed out that Ex.A7 shows that the plaintiff and the defendants 1 and 2 had jointly mortgaged the suit property in favour of one Kaliaammal on 02.07.1970. The defendants have stated in their written statement that only the defendants had mortgaged the property and since in the sale deed the plaintiff's name also mentioned, he has been included as one of the mortgagors. Further, they have stated that they only discharged the mortgage deed. The first defendant while examining himself as DW1 has stated that he only raised a loan by mortgaging the property and since the mortgagee insisted, the plaintiff was also included in the said mortgage deed. If that is true, the mortgage discharge receipt should have been obtained in the name of the first defendant alone. But the mortgage discharge receipt (Ex.A8) would show that the mortgage debt has been discharged by the plaintiff and the defendants 1 and 2. The said fact also would show that the plaintiff and defendants 1 and 2 had jointly mortgaged the suit property under Ex.A7 and they had jointly discharged the same under Ex.A8.

37. It is an admitted fact that the plaintiff has been residing in a portion of the suit property and the defendants 1 and 2 have been residing in another portion of the suit property and the remaining portions have been let out to the third parties. According to the plaintiff, himself and the first defendant were only collecting the rents from the tenants and they have divided the same. But the defendants contended that they only leased out the portion of the property to the third parties and they have been collecting the rents and no share has been given to the plaintiff. Both the parties have not produced any documentary evidence to substantiate their respective claim. Further they have not even examined any of the tenants as witness to show who is collecting the rents from the tenants.

38. According to the defendants, out of love and affection, they have permitted the plaintiff to reside in a portion of the suit property but admittedly there is no documentary evidence to that effect. Even in Ex.B39, it is not stated that the plaintiff has been permitted to reside in a portion of the suit property or he can reside there till his life time. Further, so far the defendants have not taken any steps to evict the plaintiff from the suit property. Under the said circumstances, the contention of the defendants that the plaintiff has been in possession of a portion of the property only as per the permission given by them cannot be accepted.

39. In Ex.B39 it is clearly stated that the mortgage which was created by the plaintiff and the first defendant in favour of one Janakiammal has to be discharged by the second defendant herself but Ex.A7 would show that the plaintiff and the defendants 1 and 2 jointly mortgaged the suit property in favour of one Kaliasammal for the purpose of discharging the mortgage which was made in favour of Janakiammal. Further Ex.A8 would show that the plaintiff and the defendants 1 and 2 had jointly discharged the mortgage which was created in favour of Kaliasammal. Further Exs.A3 to A6 would show that all along, the property tax stand only in the name of the plaintiff and the plaintiff only has paid the house tax. Though the first defendant, while examining himself as DW1 has produced certain house tax receipts and marked as Exs.B3 to B10, in the said receipts also it is clearly stated that the house tax stands only in the name of the plaintiff. Further DW1 has admitted in his cross examination that the water connection also stands in the name of the plaintiff. All these circumstances would show that eventhough Ex.B39 was executed in favour of the second defendant, the same was not acted upon.

40. In *Puran Singh Sahni Vs. Sundari Bhagwandas Kripalani (SMT) and others*, (cited supra) the Hon'ble Supreme Court has observed that while interpreting the agreement, the Court has to see what transpired before and after the agreement. Further it was held that the deed must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible. The relevant portion is extracted hereunder:-

'.....While interpreting the agreement we have also to see what transpired before and after the agreement. Ex praecedentibus et consequentibus optima bit interpretation. The best interpretation is made from the context. "It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected ex antecedentibus et consequentibus; every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done." As was said in *N.E. Railway v. Hastings*.

"The deed must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be so interpreted as to bring them into harmony with the other provisions of

the deed if that interpretation does no violence to the meaning of which they are naturally susceptible..."....'

In this, as already pointed out that the conduct of the parties before and after execution of Ex.B39 would show that the plaintiff has not executed the said settlement with an intention to relinquish his rights in favour of the defendants once for all.

41. In Sooriyamurthy and 3 others Vs. Chinnaswamy (Died) and 7 others, (cited supra) this Court in para No:23 has observed as follows:-

"23. While extracting the evidence of the witnesses, the lower appellate Court has also got a duty to see whether the remarks made by the trial Court about the demeanour of the witnesses is correct or not. The lower appellate Court has not done this in this case. Even though the lower appellate Court has got the right to re-appreciate the evidence, it has also got a duty to why it is not accepting the findings of the trial Court, and why it believes the evidence of certain witnesses which has been discarded by the trial Court. A mere narration of the evidence of witnesses alone is not sufficient and that is not the only duty of the lower appellate Court."

42. From the aforesaid decisions it is clear that eventhough the first Appellate Court has got right to re-appreciate the evidence, it has also got a duty to say why it is not accepting the findings of the trial Court and why it believes the evidence of certain witnesses which has been discarded by the trial Court.

43. In this case, the trial Court, taking into consideration of the fact that even after execution of the settlement deed dated 27.10.1961, the plaintiff and the first defendant continued to be in possession of the suit property and they jointly mortgaged the suit property and jointly discharged the said mortgage and also the fact that the property tax continued in the name of the plaintiff and he paid the property tax to the suit property has to be held that the said settlement deed was executed by the plaintiff and the first defendant with an intention that after the life time of the second defendant, the suit property should come back to them and they have to enjoy the same as absolute owner. The first Appellate Court had reversed the judgment of the trial Court simply relying on the

recital of Ex.B39 that the plaintiff had voluntarily relinquished his right over the suit property in favour of the first defendant. The first Appellate Court had not at all discussed about the evidence with regard to the fact that even after execution of Ex.B39 settlement deed, the plaintiff and the first defendant continued to be in possession of the suit property, they had jointly executed the mortgage and jointly discharged the mortgage and the property tax continued in the name of the plaintiff and he paid the property tax till the filing of the suit. So in view of the aforesaid decision, the first Appellate Court failed to discharge its duty to say why it is not accepting the findings of the trial Court. Therefore, the aforesaid decisions will squarely apply to the facts of this case.

44. In Gopal Krishna Ketkar Vs. Mohamed Haji Latif (cited supra), the Hon'ble Supreme Court has observed as follows:-

"...Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof..."

45. In this case, the plaintiff has taken a stand that the original settlement deed is in possession of the second defendant and she has not produced the same before the Court. The defendants contended that the plaintiff has taken away the said original settlement deed along with other documents just six months prior to the filing of the suit and hence, the said document is only with the plaintiff. As already pointed out that the non production of the original settlement deed before the Court is not at all material, because Ex.B39 is the registration copy of the said settlement deed and the same has been certified by the Sub Registrar as true copy. As per the Evidence Act, once it is certified by the concerned Authority as true copy, the contents therein cannot be questioned. Further, the first Appellate Court had sent for the concerned Register from the Sub-Registrar Office and compared with Ex.B39 and found that the contents mentioned in both the documents are one and the same. If the contents mentioned in the original and the copy are not tallied, the Sub Registrar would not have registered the said document. As per Section 114 of the Indian Evidence Act the Court may presume that official acts have been regularly performed. One of the purposes of registration is in case the original is lost, the parties can get copy from the Sub

Registrar Office and therefore, merely because the defendants have not produced the original settlement deed, no adverse inference can be drawn against them. Hence, the aforesaid decision will not apply to the facts of this case.

46. In *Sahebzada Mohammad Kamgarh Vs. Jagdish Chandra Deb Dhabal Deb* (cited supra), the Hon'ble Supreme Court in para No:12 has observed as follows:-

"12.The correctness of these principles is too well established by authorities to justify any detailed discussion. The task being to ascertain the intention of the parties, the cases have laid down that the intention has to be gathered by the words used by the parties themselves. In doing so the parties must be presumed to have used the words in their strict grammatical sense. If and when the parties have first expressed themselves in one way and then go on saying something, which is irreconcilable with what has gone before, the courts have evolved the principle on the theory that what once had been granted cannot next be taken away, that the clear disposition by an earlier clause will not be allowed to be cut down by later clause. Where there is ambiguity it is the duty of the Court to look at all the parts of the document to ascertain what was really intended by the parties. But even here the rule has to be borne in mind that the document being the grantor's document it has to be interpreted strictly against him and in favour of the grantee."

47. From the aforesaid decision it is clear that the clear disposition by an earlier clause will not be allowed to be cut down by later clause. It is also clear that where there is ambiguity it is the duty of the Court to look at all the parts of the document to ascertain what was really intended by the parties.

48. In Ex.B39 settlement deed, it is stated that since the second defendant was a widow and had no issues, a provision for maintenance has to be made for her, for the rest of her life, the plaintiff and the first defendant out of love and affection had decided to execute the said settlement deed in her favour, for her life time. After stating so, it has been added that after her life time, the person who has been shown as No.2 has to take the said property as absolute owner. In the said document, the first defendant has been shown as No.2. Though, reasons have been stated for settling the property in favour of the second defendant, no reason has been stated for taking the property by the first defendant alone as absolute owner after the life time of the second defendant. So, it is clear that the

intention of the parties was that after the life time of the second defendant, the suit property should go to both the settlors namely, the plaintiff and the first defendant. Therefore, the aforesaid decision is also in support of case of the plaintiff.

49. In Ramkishorelal and another Vs. Kamal Narayan, (cited supra), the Hon'ble Supreme Court in para No:12 has observed as follows:-

"12.The golden rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in their ordinary, natural sense. To ascertain this intention the Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used. Very often the status and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very many words are used in more than one sense and that sense differs in different circumstances. Again, even where a particular word has, to a trained conveyancer, a clear and definite significance and one can be sure about the sense in which such conveyancer would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of conveyancing. Sometimes' it happens in the case of documents as regards disposition of properties, whether they are testamentary or nontestamentary instruments, that there is a clear conflict between what is said in one part of the document and in another. A familiar instance of this is where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion. What is to be done where this happens? It is well settled that in case of such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given. (See Sahebzada Mohd. Kamgar Shah v. Jagdish Chandra Deo Dhabal Deo). (1) It is clear, however, that an attempt should always be made to read the two parts of the document harmoniously,

if possible. It is only when this is not possible, e. g., where an absolute title is given is in clear and unambiguous terms and the later provisions trench on the same, that the later provisions have to be held to be void."

50. From the aforesaid decision, it is clear that an attempt should always be made to read the two parts of the document harmoniously, if possible; it is only when this is not possible, for example where an absolute title is given is in clear and unambiguous terms and the later provisions trench on the same, that the later provisions have to be held to be void.

51. In this case, the first defendant in the settlement deed clearly stated that only with a view to make some provision to the second defendant to maintain herself the said document was executed. Further in the same document, the later part shows that the house tax shall continue in the name of the settlors. This clause II would clearly show that the plaintiff had no intention to give up his right in respect of the suit property altogether that too in favour of his brother (first defendant). Therefore, the aforesaid decision also will support the case of the plaintiff.

52. In Uma Devi Nambiar and others Vs. T.C.Sidhan (Dead), (cited supra) the Hon'ble Supreme Court in para No:12 has observed as follows:-

"12.This rule of interpretation can be invoked if different clauses cannot be reconciled. (See Rameshwar v. Balraj, AIR 1935 PC 187). It is to be noted that rules of interpretation of Will are different from rules which govern interpretation of other documents like sale deed, or a gift deed, or a mortgage deed or, for that matter, any other instrument by which interest in immovable property is created. While in these documents, if there is any inconsistency between the earlier or the subsequent part or specific clauses, inter se contained therein, the earlier part will prevail over the latter as against the rule of interpretation applicable to a Will under which the subsequent part, clause or portion prevails over the earlier part on the principle that in the matter of Will the testator can always change his mind and create another interest in place of the bequest already made in the earlier part or on an earlier occasion. Undoubtedly, it is the last Will which prevails."

53. In this case also the earlier part of Ex.B39 says that the property was given to the second defendant towards maintenance till her life time and in such a case, naturally

after her life time, the properties should come back to both the settlors. If any one of the settlors gave up his right in favour of another settlor, there must be a specific recital to that effect. But there is no specific recital in Ex.B39 that the plaintiff gave up his right over the suit property in favour of the first defendant. Therefore, the aforesaid decision also will support only the case of the plaintiff.

54. Both the brothers and the sister have resided only in the suit property. Further, as already pointed out that there is no evidence that the second defendant had collected rent from the tenants and she exclusively used the same for her benefits. Further, as already pointed out, no reason has been stated in Ex.B39 that after the life time of the second defendant, the first defendant alone can take the property as absolute owner excluding the plaintiff.

55. All these facts, would clearly show that a mistake has been crept while writing Ex.B39. In the said document, instead of mentioning that after the life time of the second defendant, the persons mentioned as 1 and 2 have to take back the said property as absolute owners, it has been wrongly written as the person, who is mentioned as No.2 has to take the property as absolute owner. As already pointed out, the intention of the brothers was to make a provision for maintenance to their sister (second defendant) as she is a widow and not having any issues and that being so, it cannot be said that the plaintiff had executed the said document with an intention to give up his right over the suit property altogether in favour of the first defendant after the life time of the second defendant. Merely, because a mistake has been committed while writing the said settlement deed, the first defendant cannot take the said mistake for his advantage and claim that the plaintiff has relinquished his right over the suit property through the said document.

56. The trial Court, after taking into consideration of the aforesaid facts, has rightly decreed the suit in O.S.No.1866 of 1985 which was filed by the said K.Muthusamy and dismissed the suit which was filed by the defendant in O.S.No.858 of 1987, but the first Appellate Court has erroneously reversed the well considered judgment of the trial Court and dismissed the suit in O.S.No.1866 of 1985 and decreed the suit in O.S.No.858 of 1987. Therefore, these Second Appeals have to be allowed. Accordingly, the substantial questions of law are answered in favour of the appellants.

57. In the result, both the Second Appeals are allowed. No costs. The judgments and decrees passed by the first Appellate Court in A.S.Nos.145 and 147 of 1994 are set aside and the judgments and decrees passed by the trial Court in O.S.No.1866 of 1985 and O.S.No.858 of 1987 are restored. Since now, the

plaintiff and the defendants 1 and 2 are died, it is open to the legal heirs of the plaintiff and the first defendant to file a suit for partition and consequential reliefs. This Court recorded the valuable assistance rendered by the learned amicus Mr.S.Soundar, Advocate.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

dna

To

1. The II Additional District Judge,
The II Additional District Court,
Coimbatore.
2. The III Additional District Munsif,
The III Additional District Munsif Court,
Coimbatore.

copy to: The Section Officer,
VR Section, High Court, Madras.

+2 ccs to M/s.V.Anand, Advocate, S.R.No.33376 and 33377

+1 cc to Mr.S.Sounthar, Advocate/Amicus Curie

S.A.Nos.142 and 143 of 1999

VG-I (CO)
SSM(25/09/2019)

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