

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 04.04.2019

Delivered on: 23.05.2019

Coram

The Honourable Mr.Justice P.RAJAMANICKAM

S.A.No.1805 of 2001

Ranganathan

...Appellant

Versus

Chinna Thambi

...Respondent

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure to against judgment and decree dated 13.08.1999 and made in A.S.No.138 of 1997 on the file of the Principal District Judge, Tiruvannamalai, reversing the judgment and decree dated 29.08.1997 and made in O.S.No. 803 of 1995 on the file of the Principal District Munsif, Tiruvannamalai.

For Appellant : Ms.A.B.Reehana Begam
for Mr.T.R.Rajaraman

For respondent : set exparte

J U D G M E N T

This second appeal has been filed by the defendant against the judgment and degree passed by the Principal District Judge, Tiruvannamalai in O.S.No.No.803 of 1995 dated 13.08.1999 reversing the judgment and decree passed by the Principal District Munsif, Tiruvannamalai in A.S.138 of 1997 dated 29.08.1997.

2.The respondent herein had filed a suit in O.S.No.803 of 1995 on the file of the Principal District Munsif, Tiruvannamalai, to declare his title over the suit properties and consequently to restrain the defendant, his men, etc, from interfering with his peaceful possession and enjoyment of the suit properties by means of permanent injunction. The learned Principal District Munsif, by the judgment dated 29.08.1997, had

dismissed the said suit with cost. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.138 of 1997 on the file of the Principal District Judge, Tiruvannamalai. The learned Principal District judge by the judgment dated 13.08.1999, had allowed the said appeal with cost and set aside the judgment and decree passed by the trial Court and decreed the suit as prayed for with cost. Feeling aggrieved, the defendant has filed the present second appeal.

3.For the sake of convenience, the parties are referred to as described before the trial Court.

4.The averments made in the plaint are in brief as follows:

a)The defendant is the elder brother of the plaintiff. They are the sons of one Manicka Konar. One Appadurai Konar is the brother of Manicka Konar. The said Manicka Konar and his brother Appadurai Konar had orally partitioned the family properties. The said Appadurai Konar died as a bachelor. He settled all his properties to the defendant during his life time under a registered settlement deed dated 09.04.1962. While so, as per the family arrangement, the plaintiff's father Manicka Konar had settled his share of the joint family properties in favor of the plaintiff under a registered settlement deed dated 12.06.1979 and also delivered possession of the said properties and from that date onwards, the plaintiff has been in possession and enjoyment of the said properties. When the defendant encroached upon the properties which were settled in favour of the plaintiff by his father, the plaintiff had filed two suits in O.S.Nos.111 of 1985 and 925 of 1985 on the file of the District Munsif Court, Tiruvannamalai and same are pending. Subsequently, on the basis of aforesaid family arrangement, the defendant had also settled items:1 to 3 of the suit properties and other properties in favour of the plaintiff under a registered settlement deed dated 14.7.1979. By virtue of the settlement deeds dated 12.06.1979 and 14.07.1979 the plaintiff has become the absolute owner of the properties. Out of the total extent of 1.32 acres, the plaintiff had sold 95 cents in Survey No.71/2 to one Masilamani Gounder retaining 11 cents as mentioned in item No.2 of the suit properties. Subsequently, the plaintiff's father had executed another settlement deed dated 24.04.1980 in favour of the plaintiff in respect of the items:4 and 5 of the suit properties and by virtue of said deed, the plaintiff has become the absolute owner of the items: 4 and 5 and the patta also granted in the name of the plaintiff. The plaintiff had sold 29½ cents out of 5.90 acres in survey No.71/2 in Viswanthangal Village to one Annamalai. Apart from this, the

plaintiff got loan by mortgaging these properties to the Land Development Bank at Thandrapattu village, by exercising all rights of ownership over the said properties. He has been paying the kist to the said properties. In fact the defendant had admitted about the partition in the reply notice dated 12.02.1995 for the notice dated 07.02.1995 sent by the plaintiff to the defendant. The fact remains so, the defendant caused loss to the plaintiff and hence the plaintiff was constrained to file the above suit for declaration and permanent injunction.

5.The averments made in the written statement are in brief as follows:

The relationship mentioned in the plaint is true. It is true that the suit properties and other properties are ancestral properties. But it is false to say that the said the Manicka Konar and Appadurai Konar orally partitioned the properties. There was no partition between the said Manicka Konar and Appadurai Konar at any point of time. It is true that Appadurai Konar died as bachelor. It is also true that he settled all the properties in favour of the defendant during his life time under a registered settlement deed dated 09.04.1962 and the defendant was also put in possession and enjoyment of the said properties. It is false to state that there was a family arrangement and in pursuance of the said arrangement, Manicka Konar had settled his share in favour of the plaintiff. Manicka Konar never executed any settlement deed whatsoever in favour of the plaintiff. In fact Manicka Konar died on 07.04.1979 itself and as such he could not have executed the settlement deeds dated 12.06.1979 and 24.12.1980. The said documents have been fabricated by the plaintiff to deprive the right of the defendant. The alienation made by the plaintiff is not known to the defendant and that the defendant is taking separate steps for recovery of his share. The allegation that the defendant attempted to encroach the suit property is false. The plaintiff has filed vexatious suits. It is false to state that the defendant had executed the settlement deed dated 14.07.1979 in favour of the plaintiff in respect of items:1 to 3 of the suit properties. The settlement is void for the reason that the daughter of the defendant namely Uma was alive on the date of execution of settlement deed. As per the Hindu Succession (Tamil Nadu Amendment) Act, 1989, the said Uma is also a co-parcener along with the defendant and any settlement made by the defendant in favour of the plaintiff without her consent and she not being made as eo-nomine party, the said settlement will not bind upon the said Uma and as such settlement deed dated 14.07.1979 is a void document. The defendant is a co-owner, as far as items:4 and 5 are concerned. As far as items 1 to 3 are

concerned, the defendant is the exclusive owner and he is in exclusive possession and he is in exclusive enjoyment of the same. It is false to state that the defendant has admitted the partition, in his reply notice dated 12.02.1995. There is no necessity for him to trespass into the suit properties. Therefore, the defendant prayed to dismissed the above suit.

6. Based on the aforesaid pleadings, the learned Principal District Munsif, Thiruvannamalai had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as P.W.1 and he also examined one more witness as P.W.2. He also marked Ex.A1 to A7 as exhibits. On the side of the defendant, the defendant examined himself as D.W.1 and he has marked one document as Ex.B1.

7. The learned Principal District Munsif, after considering the materials placed before him found that the suit property and other properties are ancestral properties of Manicka Konar and Appadurai Konar. He further found that the settlement deeds dated 09.04.1962, 14.07.1979 and 24.12.1980, have been executed without the consent of the other co-parcener and hence the said documents are void and through the said documents neither the defendant nor the plaintiff acquired any right over the properties. Further he found that the plaintiff failed to prove that he is in exclusive possession and enjoyment of the suit properties. Accordingly he dismissed the suit with cost. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.138 of 1997 on the file of the principal District Judge, Tiruvannamalai. The learned Principal District Judge, Tiruvannamalai had allowed the said appeal and set aside the judgement and decree passed by the Trial Court and decreed the suit as prayed for. Feeling aggrieved, the defendant has filed the present second appeal.

8. This Court at the time of admitting the second appeal has formulated the following substantial questions of law.

(1) whether the learned District Judge is right in allowing the appeal when it is proved by the appellant that the said Manicka Konar died on 22.04.1970 as evidence by the Exhibit B1 and whether it is correct in holding that the document Exhibit A2 alleged to have been executed by the said deceased Manicka Konar on 24.12.1980 is true and genuine.

(2) Whether the learned Principal District Judge, Tiruvannamalai, is correct in allowing the appeal A.S.No.138 of 1997 in favor of the plaintiff even after dismissing the A.S.No.137 of 1997 on its file holding that the properties are joint family properties and whether the same will not amount to granting conflicting judgments.

9. Even though, initially, the respondent, after receipt of appeal notice appeared through counsel, subsequently he remained ex parte and hence after hearing the arguments of Ms.A.B.Reehana Begam for Mr.T.R.Rajaraman, the learned counsel for the appellant and perusing the records, judgment is being passed in this second appeal.

10. Substantial Questions of Law 1 & 2:-

The learned counsel for the appellant/defendant has submitted that the first appellate Court erred in reversing the well considered judgment and decree of the trial Court. She further submitted that the first appellate Court failed to see that there was no family arrangement as pleaded by the plaintiff. She further submitted that the first appellate Court failed to see that the properties have been jointly enjoyed by both the parties and there is no partition between them. She further submitted that the said Manicka Konar died on 07.04.1979 as evidenced by Ex.B1 and that being so, he could not have executed the settlement deeds dated 12.06.1979 and 24.12.1980 in favor of the plaintiff. She further submitted that the first appellate Court failed to see that Ex.A1 settlement deed is not valid on the ground that on the date of execution of the said document, the defendant's daughter, Uma was alive but she was not even shown as eo-nomine party in the said document. She further submitted that Ex.A3 settlement deed dated 09.04.1962 itself void as it was in respect of undivided ancestral properties and consequently the other settlement deeds also not valid. She further submitted that the first appellate Court erred in allowing the appeal in A.S.No.138 of 1997 in favour of the plaintiff even after dismissing the appeal in A.S.No.137 of 1997 on its file holding that the properties are joint family properties. She further submitted that as against the dismissal of the appeal in A.S.No.137 of 1997, the plaintiff had filed a second appeal in S.A.No.621 of 2000 and the same has been dismissed for default on 26.03.2019 and hence, the judgment and decree passed in A.S.No.137 of 1997 on the file of the Principal District Judge, Tiruvannamalai, have become final and same will operate as res judicata for this case and therefore she prayed to allow the second appeal and set aside the judgment and decree passed by the first appellate Court and restore the judgment and decree passed by the trial Court.

11.It is not in dispute that the plaintiff and the defendant are brothers and they are sons of one Manicka Konar. It is also not in dispute that the said Manika Konar had a brother by name Appadurai and the said Appadurai died as a bachelor.

12.According to the plaintiff, their father Manicka Konar and his brother Appadurai Konar had partitioned their joint family properties orally during the life time of Appadurai Konar and subsequently the said Appadurai Konar had settled all his properties in favour of the defendant under a registered settlement deed dated 09.04.1962. Though the defendant in his written statement had denied the allegation that the said Manicka Konar and Appadurai Konar had orally partitioned their properties, he admitted that the said Appadurai Konar had settled all his shares in his favour under a registered settlement deed dated 09.04.1962 and he also admitted that he was put in possession and enjoyment of the said properties on the date of the said settlement deed itself.

13.A Registration copy of the settlement deed dated 09.04.1962 executed by the said Appadurai Konar in favour of the defendant has been produced by the plaintiff and marked as Ex.A3. In the said document, the said Appadurai Konar had stated that the properties mentioned in the said document belonged to him and they are in his possession and enjoyment. Further, the defendant himself admitted in his written statement that he was put in possession of the aforesaid properties. So, it is clear that the aforesaid properties were already partitioned and they were in exclusive possession of the said Appadurai Konar.

14.It is also to be pointed out that in Ex.A6 reply notice, the defendant had admitted that already partition effected and that the plaintiff and the defendant are in possession and enjoyment of their respective shares. Further, the defendant while examining himself as D.W.1, in his cross examination had admitted that a separate patta has been issued in the name of the plaintiff in respect of the land, which is in the plaintiff's possession and likewise a patta has been granted in his name in respect of the property which is in his possession. Further, he admitted that he is paying kist for his lands and he separately obtained loan from the Land Development Bank, Thandrapattu. All these facts would clearly establish that the properties were already divided.

15.It is also to be pointed out that according to the plaintiff, there was a family arrangement and in pursuance of the said arrangement, his father executed settlement deeds in his favour and the defendant also executed Ex.A1 settlement deed dated 14.07.1979 in his favour in respect of items 1 to 3 of the suit properties and other properties and in turn, he executed a settlement deed in favour of the defendant's wife in respect of certain properties which were obtained by him under Ex.A7 settlement deed dated 12.06.1979 from his father. The defendant also admitted in his evidence that he had executed Ex.A1 settlement deed in favor of the plaintiff in respect of the items: 1 to 3 of the suit property and other properties. He also admitted in his evidence that the plaintiff had executed a settlement deed on 25.08.1980 in favour of his (defendant's) wife in respect of certain properties and subsequently his wife had sold the same to one Annamalai Naidu. The aforesaid facts also show that there was a family arrangement and only in pursuance of the said arrangement, Manicka Konar had executed Ex.A2 and A7 settlement deeds in favour of the plaintiff and the defendant also executed Ex.A1 settlement deed in favor of the plaintiff and in turn the plaintiff had executed a settlement deed dated 25.08.1980 in favour of the defendant's wife in respect of certain properties.

16.It is also to be pointed out that the defendant admitted in his evidence that the plaintiff had sold 95 cents to one Masilamani and 2½ acres to one Annamalai Naidu. The aforesaid fact also would show that all the settlement deeds were acted upon and the plaintiff and the defendants are all in separate possession and enjoyment of their respective shares.

17.Now coming to the Ex.B1 document, the said document is an obituary card in which it is stated that Manicka Konar died on 07.04.1979 and his final funeral would be held on 22.04.1979. Apart from the said document, the defendant has not produced any other document to show that his father Manicka Konar died on 07.04.1979. The defendant has not produced any death certificate. Ex.B.1 could be created at any time. In the absence of any other evidence, no reliance can be placed upon Ex.B.1. Further, the evidence on record would show that the said Manicka Konar would not have died on 07.04.1979 because he had executed Ex.A7 settlement deed on 12.06.1979 and Ex.A2 settlement deed on 24.12.1980. The said documents are registered documents. They would have some sanctity. Further, admittedly, the plaintiff had executed settlement deed in

respect of certain properties which were derived by him under Ex.A2 and A7 settlement deeds in favour of the defendant's wife. So, it is not open to the defendant to contend that Ex.A.2 & A.7 are fabricated documents. The principle of estoppel will apply. Further, the plaintiff had sold some of the items of the properties which were derived by him through Exs. A2 and A7 to Manicka Konar and Annamalai Naidu and the said transactions were not challenged by the defendant. Under the said circumstances, the contention of the defendant that his father Manicka Konar died on 07.04.1979 and hence he could not have executed Exs.A2 and A7 settlement deed in favor of the plaintiff cannot be accepted.

18.As far as the plea of the defendant that his daughter is a co-parcener and without her consent, he had no right to execute Ex.B.1 settlement deed in favour of plaintiff is concerned, the said Ex.A.1 settlement deed was executed by the plaintiff on 14.07.1979, much before the commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989. So, on the date of execution of Ex.A.1 settlement, it cannot be said that the defendant's daughter was a co-parcener. Therefore, the contention of the defendant that since her daughter's consent has not been obtained, Ex.A.1 is not a valid document cannot be accepted.

19.It is true that the other suit in O.S.No.111 of 1995, which has been filed by the plaintiff, was dismissed by the trial Court and the appeal filed by the plaintiff in A.S.No.137 of 1997 also dismissed on the ground that the well situated in S.No.59/4 and the electric motor fixed in the said well are common to both the plaintiff and the defendant, but it does not mean that all the properties are also enjoyed by both the parties commonly without any partition. The well cannot be divided between the parties and it can be used only commonly and therefore the findings recorded by the first appellate Court in A.S.No.137 of 1997 in respect of the well and electric motor will not operate as res judicata in this case.

20.For the aforesaid reasons, this Court is of the view that the first appellate court after taking into consideration of all the materials in a proper perspective had reversed the judgment and decree of the trial Court and decreed the suit in O.S.No.803 of 1995 as prayed for and in the said factual findings this Court cannot interfere, and therefore, the substantial questions of law are answered against the appellant/defendant.

21. In the result the second appeal is dismissed. No costs.

Sd/-
Assistant Registrar (CO MDU)

//True copy//

Sub Assistant Registrar

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To

1. The Principal District Judge, Tiruvannamalai.

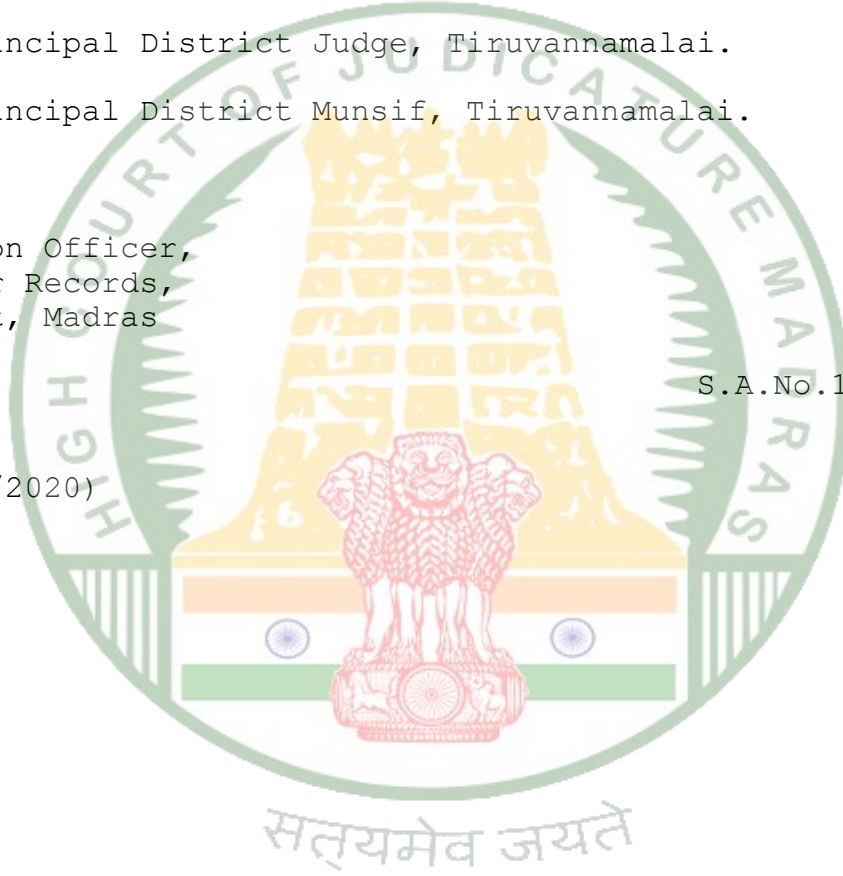
2. The Principal District Munsif, Tiruvannamalai.

Copy To

The Section Officer,
Vernacular Records,
High Court, Madras

S.A.No.1805 of 2001

BP (CO)
GMY (18/08/2020)



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