

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.04.2019

PRONOUNCED ON : 24.04.2019

CORAM

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

S.A.No.1072 of 2008
and M.P.No.1 of 2008

1. Rajammal (died)
 2. D.Indiran
 3. D.Muthu

... Appellants

Vs.

V.K.Meyyazagan

... Respondent

2nd appellant recorded as LR and 3rd appellant
 brought on record as LR of the deceased 1st appellant
 vide order of this Court dated 04.06.2012
 made in M.P.No.1/2012 in S.A.No.1072/2008

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 07.03.2008 made in A.S.No.23 of 2007 on the file of the Sub Court, Poonamallee, confirming the Judgment and Decree dated 17.08.2006 made in O.S.No.481 of 1984 on the file of the District Munsif Court, Poonamallee.

For Appellants

: Mr.V.Bhiman
 for M/s.C.H.Hanumantha Rao

For Respondent

: M/s.Chitra Sampath (Senior Counsel)
 for M/s.T.S.Baskaran

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 07.03.2008 passed in A.S.No.23 of 2007 on the file of the Sub Court, Poonamallee, confirming the Judgment and Decree dated 17.08.2006 passed in O.S.No.481 of 1984 on the file of the District Munsif Court, Poonamallee.

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

3. Suit for declaration, recovery of possession and injunction.

4. The case of the plaintiff, in brief, is that the plaintiff is the son of late Krishnappa Naicker born through his second wife and first defendant is the daughter of late Krishnappa Naicker born through his first wife. The defendants 2 & 3 are the sons of the first defendant. The suit property was allotted to the plaintiff's father in the year 1953. After such allotment he was in possession of the property. Later by a deed of settlement dated 04.01.1961, he settled the property in favour of the plaintiff. The property of an extent of 32 cents in S.No.108/1 at all times had been in possession and enjoyment of the plaintiff as the absolute owner thereof. The first defendant has no right over the property and similarly defendants 2 & 3 also have no right over the property. Two year ago the defendants put up thatched shed measuring 23' North - South and 12' East - West. The plaintiff has requested

them to remove the thatched shed and hand over the property but they did not do it. Hence the suit for declaration, recovery of possession and injunction.

5. The case of the defendants, in brief, is that the suit is not maintainable either in law or on facts. Admitting the relationship between the parties, the alleged partition in the year 1953 among the brothers of late Krishnappa Naicker is denied. Further the alleged settlement deed in favour of the plaintiff is also denied by the defendants. The plaintiff has never been in enjoyment and possession of the suit property at any time. After the alleged settlement deed, the alleged settlor himself has mortgaged the suit property to Ramachandran in the year 1965 and failed to redeem the same during his life time. The same was redeemed by Sathyasivan, son of late Natesa Naicker, who has been in possession and enjoyment of the same till all the other co-owners including this plaintiff who have sold their properties in 1985 by allotting the suit property along with other entire joint family properties in Survey No.111/2 to an extent of Acre 0.18 and another undivided 1/3rd share in survey No.105, were allotted to the first defendant. The first defendant was in possession and enjoyment of the said lands thereafter as an absolute owner. Thereafter the first defendant executed a settlement deed in favour of the second and third defendants in the year 1994. According to the defendants they were in possession and enjoyment of

the entire property in the suit survey No.108/1 i.e., 0.32 cents and the plaintiff has no cause of action to institute the suit and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case, PWs 1 to 3 were examined and Exs.A1 to 13 were marked. On the side of the defendants, DW1 to 3 were examined and Exs.D1 to 7 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to decree the suit as prayed for. Impugning the same, the present second appeal has been laid.

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

“(i) Whether the lower appellate Court has failed to appreciate that oral and documentary evidence adduced by the defendants in proper perspective and the judgment is vitiated.

(2) Whether the Courts below have failed to consider the relevant provisions of Hindu Succession Act in proper perspective and the conclusion that the first defendant is not

entitled to any share in the suit property is unsustainable in law”.

9. The learned counsel for the appellants submitted that the plaintiff claims title to the suit property based upon the settlement deed Ex.A1 executed by Krishnappa Naicker in his favour. Ex.A1 was never acted upon, it is sham and nominal. When Ex.A1 was executed, the plaintiff was a minor and the subject property was said to have been given through guardian who is uncle of the plaintiff. It is the contention of the learned counsel that when the father was very much alive, appointing some other person as guardian itself indicates that the document is sham and nominal. It is further contended that under Ex.A4, the mortgage deed dated 29.12.1965 late Krishnappa Naicker and his minor son the plaintiff herein executed a mortgage deed in favour of Sambanda Moorthy Naicker in respect of the suit property. The above facts clearly indicate that Ex.A1 was not acted upon, whereas the release deed Ex.A.11 clearly indicates that all the properties were held as joint family properties, therefore it is his contention that when Ex.A1 was not acted upon, the plaintiff cannot succeed in seeking a declaration in respect of the suit properties. The patta is in the name of the first defendant and legal notice issued by the plaintiff has also not referred about the settlement. All these facts clearly indicate that Ex.A1 has not been acted upon. The First Appellate Court without appreciating the facts properly has decreed the suit. It is the contention of the learned counsel that the

plaintiff has failed to prove the title and mortgage was also not redeemed by the plaintiff. The above conduct clearly indicates that Ex.A1 was never acted upon. Hence he submitted that the judgment of the First Appellate Court is liable to be interfered with. In support of his submission he has also relied upon the judgment rendered by this Hon'ble Court reported in 2016 (4) CTC 58 in the case of ***Sukumaran Vs Madhava Shastri and others.***

10. Whereas the learned senior counsel appearing for the respondent submitted that since uncle was shown as a guardian of the minor to give effect to settlement deed on behalf of the minor, it cannot be said that settlement has not been acted upon. Guardian can be appointed by testament also since the settlor himself has executed a settlement in favour of his minor son appointing his uncle as a guardian to give effect the deed is not against law. Further the learned senior counsel contended that under Ex.A4 mortgage deed, though the father also joined in the deed, the fact remains that apart from the minor's property, the individual property of settlor together was mortgaged, therefore the settlor also was shown in the above mortgage deed. Similarly it is the contention that during the land acquisition proceedings the amount has been settled in favour of the plaintiff as per Ex.A7 and settlement is also proved before the Court, the guardian appointed under the deed has also been examined as witness and one of the witnesses was also examined to prove the signature of the attesting witness. When the document has clearly established that the plaintiff has derived title

and the first defendant cannot contend that she has become the owner of the property, there is no partition deed filed by the first defendant to show that the property was allotted to the first defendant. The learned senior counsel further submitted that Ex.B1 has been created for the purpose of case and it is evident when compared with certified copies Ex.B1 filed as Ex.A9. Hence the First Appellate Court has appreciated the entire facts and arrived at a finding, hence prayed for dismissal of the suit.

11. The suit has been laid by the plaintiff for declaration of title in respect of the suit property. The plaintiff reign his title under Ex.A1 settlement deed. Ex.A1 settlement deed executed by his father Krishnappa Naicker in his favour. The relationship of parties are not in dispute. The plaintiff is the only son born to Krishnappa Naicker through his second wife, the first defendant is the daughter of Krishnappa Naicker born through his first wife. The defendants 2 & 3 are the sons of the first defendant. These facts are not in dispute. Ex.A1 is of the year 1961, more than 30 years old. Since the document is more than 30 years old execution of the document can be presumed under Section 90 of the Indian Evidence Act. Besides PW2 Chandra Naicker was appointed as a guardian of minor and he was examined to prove Ex.A1. PW3 one of the witness was examined to prove the signature of one of the attesting witness found in Ex.A3. It is not the case of the defendants that Ex.A1 is not executed by her father. But the main defence is

that Ex.A1 has not been acted upon. It is only sham and nominal. When the execution of the documents is not denied, further fact that the document is more than 30 years old its execution clearly established on record not only by the evidence adduced on the side of the plaintiff, but also admission of the defendants. Be that as it may. Ex.A1 carefully shows that the father of the plaintiff has settled the property in favour of his minor son, the plaintiff who was nine years old at the time of settlement deed, he has settled the properties with specific boundaries. Suit property is one such property covered under Ex.A1. The settlor has clearly stated in his document that the suit property came into his allotment ever since the allotment and after he became the owner, he has executed the settlement deed in favour of his minor son through the testamentary guardian the property has been settled in favour of the plaintiff. Ex.A2 and Ex.A3 indicates that the father of the plaintiff has dealt with the above property by mortgaging the property to various third parties. Ex.A4 mortgage deed 29.12.1965 would clearly show that both the father and the son have executed the mortgage in favour of one Sampantha Moorthy not only respect of properties settled in favour of the plaintiff but also other property owned by father of plaintiff S.No.111/2, the father acted as a guardian of the minor and mortgaged the property. Merely because the father has stood as a guardian and effected mortgage of the property settled in favour of the plaintiff, it cannot be said by the defendants that settlement itself has not been acted upon and it is only sham

and nominal. For giving effect to the settlement, testamentary guardian was appointed under Ex.A1. Thereafter in the year 1965, the father himself acting as guardian of the minor has executed the mortgage in favour of Sampantha moorthy. Besides, he has also mortgaged his property in Ex.A4 when both minor property and settlor property is mortgaged at the relevant time, the plaintiff was a minor, father executing the document cannot be construed to mean that Ex.A1 settlement was not acted upon and invalid. One of the document Ex.A11 would clearly show that it is a release deed executed among the co-owners, wherein the plaintiff is one of the parties, release deed indicates that right of co-sharers have been released in respect of certain properties with specific boundaries. The entire release deed would clearly show that only the above portion was treated as a joint family property after oral partition said to have taken place 35 years back. In the release deed there is no mention about other properties, contained in Ex.A1. The same would clearly indicate that except the property which is the subject matter under Ex.A11, other properties had already been partitioned, therefore merely on the basis of Ex.A11, it cannot be stated that Ex.A1 property is also joint family property and in enjoyment of all the co-owners. The recitals of Ex.A1, A11 clearly indicate that family properties were already divided in oral partition. One of the properties were divided and specific share has been allotted to the male member. Even assuming that the property which is the subject matter of Ex.A1, is the joint family property, admittedly,

at the relevant point of time, the plaintiff alone being son has become a co-parcenor along with his father. Executing the settlement in favour of his only son, the son has acquired absolute title over the property. Absolutely there is no issue or dispute as to the fact that whether the plaintiff is illegitimate son or second marriage of his father was valid or not, all those facts have not at all been raised in the plaint and in the written statement. In the absence of any dispute as to the status of the parties it has to be held that plaintiff is legitimate son of his father.

12. In view of the above fact it has to be construed that only the plaintiff is the co-parcenor with father. But wherein in this case, the father has executed the settlement deed in favour of his only son. Even assuming that the plaintiff is also a co-parcenor, since he is beneficiary, he has acquired entire title though in general settlement cannot be executed in respect of undivided property. In the given case, only father and son are co-parceners, the father is entitled to his share in the property after oral partition and plaintiff is entitled to his share. That being the position, it cannot be said that the settlement is not valid in the eye of law. In any event, this aspect is not an issue before the trial Court or before the First appellate Court. Be that as it may. The trial proceeded that the suit property was allotted to the father of the plaintiff ever since such allotment he became the owner, thereafter he executed the settlement deed in favour of

the plaintiff who is the only son. Whereas the defendants who contended that since the mortgage has not been redeemed, the plaintiff cannot claim title. It is to be noted that the plaintiff has issued a notice after attaining majority to the mortgagee to receive the mortgage money. The mortgagee under Ex.A4 also appears to have received the entire mortgage amount and made an endorsement in the deed itself. Though the judgment cited by the learned counsel appearing for the appellants that once the mortgage deed executed by Mortgagor was duly registered, redemption of such mortgage should also be by registered document or receipt, mortgagor though claimed redemption, did not produce any document evidencing such redemption, discharge of mortgage alleged by mortgagor not to be accepted. The facts of the above case cannot be applied to the case in hand. Therefore the judgment relied upon by the learned counsel for the appellants is not applicable to the facts of the case. Whereas in the given case, mortgagee under Ex.A4 has made an endorsement in the document itself for having received the entire mortgage amount. Such endorsement was made as early in the year 1983. Even assuming to be true that the mortgage has not been redeemed or mortgage money has not been paid, that cannot be a ground to contend that the plaintiff cannot derive the title under Ex.A1. It is for the mortgagee in such case to enforce the mortgage for recovery of money, as long as the mortgagee has not taken any action in this regard the same cannot be taken advantage of by the defendants to contend that Ex.A1 has not been acted

upon. The defendants has set up a title. According to the first defendant, the suit property has been given to her by her cousin brother. It is the case of the defendants that the suit property in survey number were given to the first defendant in oral partition by relatives in the year 1985 thereafter she was in enjoyment of the same. The partition alleged by the first defendant has not been established. Ex.B1 was filed by the defendants to show that she has settled the property to defendants 2 & 3. Ex.B1 is settlement deed executed by the first defendant, where in originally it is shown as D2 & D3 who are sons of Duraisamy, whereas the certified copy filed to the above document marked as Ex.A9 clearly indicate that instead of Duraisamy, Krishnappa Naicker's name was found such difference makes it very clear that Ex.B1 has been created only for the purpose of the case. Further Ex.B1 itself recited to the effect that during the life time of her father, an extent of 46 cents were allotted to the first defendant, wherein in the written statement she has

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taken the stand to the effect that the property was allotted in an oral partition by relatives. The above contrary stand of the first defendant also clearly indicate that the defence set up by the defendants is not true one and it is only to thwart the suit filed by the plaintiff. The Courts below have considered this aspect and assessed oral as well as documentary evidence and

arrived at the findings. This Court also perused the documents as discussed above and holds that the plaintiff has established title to the property. Accordingly, the substantial questions of law formulated in this second appeal are accordingly answered in favour of the plaintiff/respondent and against the defendants/appellants.

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

24.04.2019

Speaking order / Non-speaking order

Index : Yes / No

Internet : Yes / No
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To

1. The Sub Court, Poonamallee,
2. The District Munsif Court, Poonamallee.

Pre-Delivery Judgment made in
S.A.No.1072 of 2008

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SA.No.1072 of 2008**N.SATHISH KUMAR, J.**

The Judgment in Second Appeal No. 1072 of 2008 was reserved on 16.04.2019 and pronounced on 24.04.2019, wherein it was dismissed. The Second Appeal is posted today ie., 04.07.2019 "for being mentioned" at the instance of the learned counsel appearing for the appellants.

2. The learned counsel appearing for the appellants represented that throughout the Judgment (including the prayer) in SA.No.1072 of 2008, the suit number has been wrongly mentioned as 'O.S.No.481 of 1984' instead of 'O.S.No.481 of 1994'.

3. In the light of the above, throughout the Judgment (including the prayer), the suit number shall be mentioned as 'O.S.No.481 of 1994'.

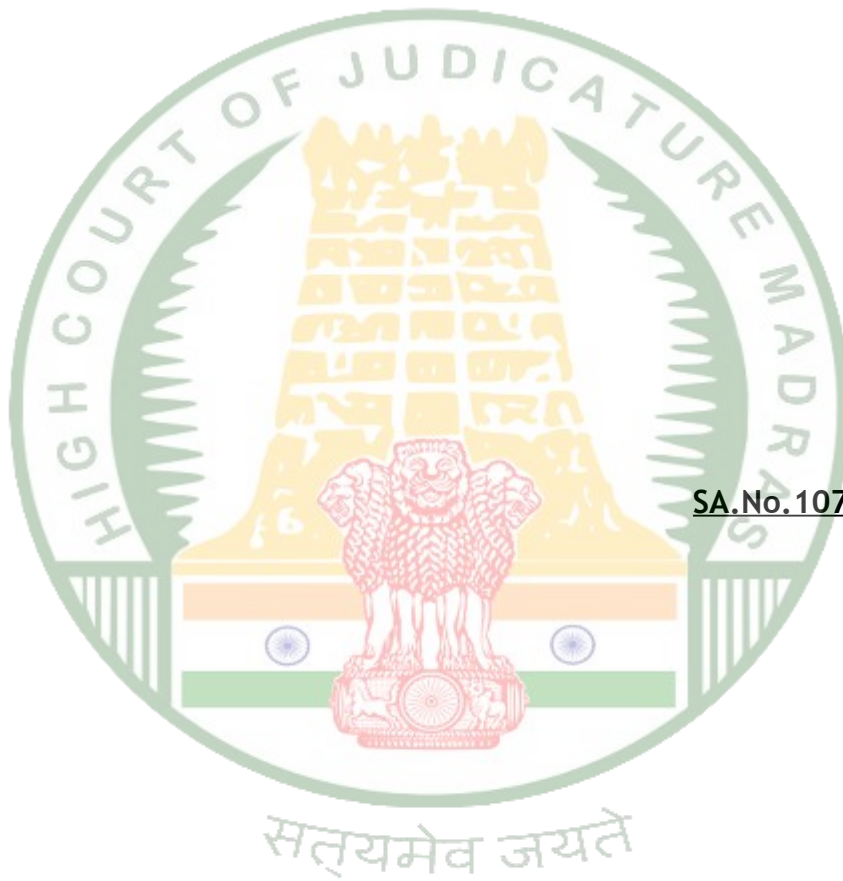
4. The Registry is directed to carry out the above said correction in the Judgment and decree of the Second Appeal and issue fresh order copy incorporating the above.

04.07.2019

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