

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.07.2019

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.1032 of 2009
and MP.No.1 of 2009 and CMP.No.20377 of 2016

S.VenkatesanAppellant/Appellant/
Plaintiff

Vs

1.Ramani (Deceased)
2.K.Krishnaraj (Deceased)
3.Venkatalakshmi (Deceased)
4.Kalidass (Deceased)

.....Respondents/Respondents/
Defendants

5.K.Vijaya
6.K.Manicakam Respondents

(R5 brought on record as LR of the deceased R2 Vide order of Court dated 21.04.2016 made in MP.Nos.1 & 4 of 2015 in SA.No.1032/2009

(R6 brought on as LR of the deceased RR3 & 4 Vide order of Court dated 21.04.2016 made in MP.Nos.1 & 4 of 2015 in SA.No.1032/2009)

(R5 is recorded as legal heir of the deceased R1 viz., Ramani Vide order of Court dated 19.06.2019 made in SA.No.1032/2009 as per Memo in USR No.17285/2019 is recorded)

Prayer :- Second Appeal filed under Section 100 of the Civil Procedure Code, preferred against the judgment and decree dated 30.09.2008 in A.S.No.19 of 2008 on the file of the Principal Subordinate Judge, Salem confirming the judgment and decree dated 03.12.2007 in O.S.No.715 of 2006 on the file of the Principal District Munsif Court, Salem.

For Appellant : Mr.D.Shivakumaran
For Respondents : R1 to R4 - Died
Mr.T.Muruga Manickam, Senior Counsel
Assisted by Ms.Zeenath Begum for R5 & R6

JUDGMENT

The plaintiff who has lost his suit for declaration of title and possession over the suit property successively before the Courts below, has come forward with the appeal. Parties would be referred to by their rank before the trial Court.

2.1 According to the plaintiff, the suit property is one of the twin houses that was jointly held by one Senraya Chetty and his brother Perumal Chetty. The plaintiff claims to be the heir of Senraya Chetty, whereas defendants 1 and 3 claim under Perumal Chetty. The second defendant is the husband of the first defendant and the fourth defendant is the husband of the third defendant.

2.2 Plaintiffs pleads that, Senraya Chetty and Perumal Chetty had entered into a registered partition deed on 10.12.1962, marked as Ext.A-1, where under, both the houses were allotted to the share of Senraya Chetty. It also provided that Senraya Chetty would undertake to repay certain family loan to other parties, and would pay an additional sum of Rs.100/- to Perumal Chetty, and in terms of the partition deed, Perumal Chetty and his wife were allowed to reside in the northern house during their life time. Perumal Chetty died on 05.12.1997 and his widow died on 04.11.2005. Since their children namely the defendants 1 and 3 refused to vacate the property and hand over possession to the plaintiff, the plaintiff laid the suit was laid.

3. The Courts below have rejected Ext.A-1 partition deed, essentially on the ground that while Perumal Chetty had two daughters, defendants 1 and 3, in the partition deed, it is recited that he is issue-less. An attempt was made by the counsel for the plaintiff/appellant before the Courts below that the said recital would only mean a male descendant, and the word "male" is seen omitted in the document. But, this argument was rejected. Secondly, the Courts below took note of certain receipts issued by the Electricity Department for consumption of power to negate the plaintiff's claim of right to suit property.

4. This appeal was admitted on the following substantial questions of law :

a) Whether the recital in Ext.A-1 can negate its effect as a partition deed?

b) When P.W.2 clearly deposed about the genuineness and validity of Ext.A-1, are the Courts below correct in law in holding that the plaintiff has failed to prove the Ext.A-1 registered partition deed?

c) In the absence of any evidence from the defendants to disprove the plaintiff's title and when the plaintiff has amply proved that the defendants are only under permissive possession granted by way of Ext.A1 are the Courts below correct in dismissing the suit?

d) Are not the judgment and decree of the Courts below liable to be set aside for non consideration of the evidence available on record in its correct perspective?

5. The learned counsel for the appellant argued that Ext.A-1 has not been properly constructed, in the sense, the recital of Ext.A-1 was allowed to rule over the terms of the partition. While the recital of a document may constitute an admission to bind the parties thereto, an error in the recital, by itself would not be adequate to negate the effect of a document if it can be contextually explained. Arguing further, the learned counsel for the appellant submitted that Ext.A-1 deserves to be constructed contextually, and the time setting in which it came into existence. It is true in Ext.A-1 it is recited that Perumal Chetty does not have any heir [sandadhi], but in the context of 1962, 'sandadhi' generally implies a male heir, more so when the daughters are given in marriage. The first appellate Court here lost sight of the realities of the life affecting the Indian society and this reality needs to be reckoned by this Court. So far as payment of electricity charges etc., by the defendants are concerned, obviously they have to pay the charges since Perumal Chetty was in occupation. After all, he who uses any services needs to pay for those services.

6. Per contra, the learned counsel for the respondents 5 and 6 would argue that it is not just a case of constructing one word 'sandadhi' in the recital in Ext.A-1, but it is all about understanding the case of the defendants as disclosed in the written statement. First, Ext.A-1 was never shown to have been disclosed by Senraya Chetty or his children, the plaintiff herein, at any time during the lifetime of Perumal Chetty or his wife Rukkumani Ammal. It was first disclosed in Ext.A-7 suit notice, dated 30.06.2006. But, before the defendants could react and respond to that notice, the suit itself was laid within about 13 days, and in the written statement, the defendants have

contended that Ext.A1, partition deed is falsely created and it is not valid. They further go to plead that some 40 years prior to the institution of the suit, there was an oral partition, in which the northern half of the suit property was allotted to Perumal Chetty, and the southern half of the suit property was allotted to the share of Senraya Chetty. Secondly, the original partition deed dated 10.12.1962 was not produced, but only a certified copy was produced. P.W.4, Bank Manager had produced the attested copy of the original partition deed and this is marked as Ext.A10. This photocopy though purported to contain the signature of Perumal Chetty, that was not even confronted to the defendants when they were in the witness-box. When the contest is all about the genuineness of Ext.A-1, the burden is entirely on the plaintiff to prove the same.

7. After carefully appreciating the rival submissions, this Court finds that there is merit in the submission of the counsel for the respondents. Ext.A-1 partition deed is not admitted anywhere by the defendants in this suit, nor shown to have been admitted by their parents namely Perumal Chetty and Rukkumani Ammal when they were alive. Secondly, if partition had taken place in 1962, and if Perumal Chetty was considered only as a permissive occupant ever since, then consistent with the ordinary course of human conduct, this Court would expect some acts of ownership that the party who asserts title to perform. The minimum this Court expects is that Senraya Chetty ought to have at least mutated the revenue records, or the property tax assessments in time, soon after Ext.A-1, partition deed. These acts were not shown to have been done till the demise of defendants' mother Rukkumani Ammal on 04.11.2005. Therefore, it is extremely doubtful if Ext.A-1 is genuine, or at least was acted upon in the context of the present case. It is here the contention of the respondents' counsel that Ext.A10, or the original of Ext.A-1, partition deed was not confronted to D.W.1, gains significance. Necessarily, the plaintiff has to lose his claim on Ext.A-1.

8. It is an admitted fact that plaintiff is in possession of the southern half of the suit property which is described as item No.1 in Ext.A-1, partition deed and the entire dispute is all about the northern half of the suit property which is described as item No.2 in the partition deed. Here, there is some degree of unanimity or concession in that, the defendants themselves concede that in an oral partition that had taken place between Senraya Chetty and his brother Perumal Chetty, Senraya Chetty was given southern half of the property with a residential building. This southern half, as indicated above is described as item No.1 in Ext.A-1 = Ext.A-10, partition deed. Therefore, literally there is no contest for item No.2 in Ext.A-10 and to that extent the plaintiff's title can be declared.

9. In conclusion, this appeal is partially allowed and the plaintiff's title to southern half of the suit property described as Item No.1 in Ext.A-10, partition deed is declared in his favour. (It is made clear that Ext-A10 here is relied only for the sake of convenience for identifying the property in relation to which the plaintiff's title is declared, and not for any other purposes). The judgment and decree dated 30.09.2008 in A.S.No.19 of 2008 on the file of the Principal Subordinate Judge, Salem is hereby modified to the extent indicated. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

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To:

- 1.The Principal Sub Court
Salem.
- 2.The Principal District Munsif Court
Salem.
- 3.The Section Officer
VR Section, High Court, Madras

+1 cc to Ms.Zeenath Begum Advocate sr58215
+1 cc to M/s.D.Shivakumaran Advocate sr57717

S.A.No.1032 of 2009

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