

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :25.02.2019

PRONOUNCED ON:14.03.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.996 of 2005

1.Pavadai

2.Minor Krishnamoorthi,
[Minor rep. By 1st appellant
his father] Appellants/Defendants 3& 5

Vs.

1.Lakshmi

2.Asali

3.Sanyasi

4.Periyammal Respondents/Plaintiffs 1 & 2,
Defendants 2&4

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree of the Subordinate Judge's Court at Kallakurichi, dated 15.02.2005 in A.S.No.39 of 2003 reversing and modifying the judgment and decree of the III Additional District Munsif Court at Kallakurichi dated 31.12.2002 in O.S.No.309 of 1998.

For Appellants : Mr.Mythili Suresh

For Respondents : M/s.R.Meenal

J U D G M E N T

Challenge in this Second Appeal is made to the judgment and decree dated 15.02.2005 passed in A.S.No.39 of 2003 on the file of the Subordinate Court, Kallakurichi, reversing and modifying the judgment and decree dated 31.12.2002 passed in

O.S.No.309 of 1998 on the file of the III Additional District Munsif Court, Kallakurichi.

2.The second appeal has been admitted on the following substantial questions of law.

(1)When as per the provisions of Section 107 of the Evidence Act, the burden of proving that a person is dead is upon the person who affirms it, whether the lower appellate court is justified in law in holding that it is for the appellants to establish that Alamelu Ammal died after the execution of Ex.B6 dated 06.08.1992, especially when it is the case of the respondents 1 and 2 /plaintiffs that she died in 1991 and there is no proof for the same?

(2) Whether the lower appellate court is correct in law in eschewing Exs.B10 to B12 namely partition deed and settlement deeds, which would clearly prove the contention of the appellants?

3.Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of case in detail.

4.For the sake of convenience, the parties are referred to as per the rankings in the trial court.

5.The plaintiffs have laid the suit against the defendants for partition. The relationship between the parties is not in dispute. It is found that the plaintiffs 1 and 2 and the 4th defendant are the daughters and the defendants 2 and 3 are the sons of the first defendant. The 5th defendant is the son of the 3rd defendant. The wife of the first defendant Alamelu Ammal had died. It is also seen that the first defendant and Alamelu Ammal had another son by name Raja, who had died unmarried and it is evident that his father namely the first defendant is his legal heir.

6. Claiming that the plaint 'A' schedule property is the separate property of Alamelu Ammal, the mother of the plaintiffs by virtue of the sale deed dated 05.07.1970 and after her demise, her children being her legal heirs and her son Raja having died unmarried, further putting forth that the plaint B schedule properties are the ancestral joint family properties of the defendants 1 to 3 and by virtue of the amendment in the Hindu Succession Act, the plaintiffs are also each entitled to claim 1/5th share in the same and as the 4th defendant had got

married long back, she would not be entitled to claim any share in the plaint 'B' schedule properties and further putting forth the case that the plaintiffs and the defendants are enjoying the suit properties jointly and with a view to deprive the plaintiffs' share in the suit properties, certain transactions are found to have been made in favour of the 5th defendant, which are not binding upon the plaintiffs and accordingly seeking their lawful share in the suit properties, the plaintiffs have come forward with the suit for partition.

7. The defendants have resisted the plaintiffs' suit contending that Alamelu ammal had owned the plaint A schedule property and settled the same in favour of her deceased son Raja and the 3rd defendant and after the demise of Raja, the first defendant, who is his legal heir had inherited Raja's share in the plaint A schedule property and settled the same along with other properties in favour of the 5th defendant and accordingly contended that the plaint A schedule property is equally owned only by the 3rd defendant and 5th defendant and therefore, the plaintiffs or the other defendants would not be entitled to claim any share in the said property. As regards the plaint B schedule properties, they disputed case of the plaintiffs that they are the ancestral joint family properties and according to them, the first defendant had inherited only 24 cents in R.S.No.100/2 described in item 2 of the plaint B schedule properties as well as the vacant sites shown as items 5 to 7 of the plaint B schedule properties and the other items shown in the plaint B schedule properties are not the ancestral joint family properties of the first defendant and the defendants 2 and 3 and furthermore according to the defendants, the first defendant out of his own income had derived the other lands shown in the plaint B schedule properties and also acquired other properties and therefore the abovesaid properties are the self acquired properties of the first defendant in which, the plaintiffs are not entitled to claim any share and inasmuch as the plaintiffs had been given in marriage, providing good seers, they are not entitled to claim any share in the ancestral joint family properties also, and further according to the defendants, by way of a partition deed dated 03.02.1993, effected by the first defendant, whereunder the first defendant had allotted separate shares in the properties in favour of his son, the deceased Raja and after the demise of Raja, the share allotted to Raja was settled in favour of the 3rd defendant and his minor son, the 5th defendant by way of two settlement deeds dated 12.09.1997 by the first defendant and therefore excepting the extent of 24 cents in item 2 and the vacant sites, the plaintiffs are not entitled to claim any share in the plaint B schedule properties and the suit laid by the plaintiffs is bad for misjoinder of causes of action and the suit is liable to be dismissed.

8. In support of the plaintiffs' case, P.Ws 1 and 2 were examined. Ex.A1 was marked. On the side of the defendants, D.Ws1 to 3 were examined. Exs.B1 to B11 were marked. The trial court on a consideration of the materials placed on record and the submissions made was pleased to determine that the plaintiffs are entitled to obtain 2/5 share in the items 5 to 7 and an extent of 24 cents of land in item 2 of the plaint 'B' schedule properties and accordingly granted the preliminary decree in favour of the plaintiffs and dismissed the plaintiffs' suit in respect of the other properties. Impugning the same, the plaintiffs preferred the first appeal. The first appellate court, on an analysis of the materials placed on record and the submissions made, determined that the plaintiffs are entitled to claim partition of their separate shares both in respect of the plaint A schedule property as well as the plaint B schedule properties as claimed by them and accordingly reversed and modified the judgment and decree of the trial court and disposed of the appeal in favour of the plaintiffs. Impugning the same, the defendants 3 and 5 have come forward with the present second appeal.

9. It is not in dispute that the plaint A schedule property belonged to Alamelu Ammal, the mother of the plaintiffs and the defendants 2 to 4, by virtue of the sale deed dated 05.07.1970, the certified copy of which has been marked as Ex.A1 and the original sale deed has been marked as Ex.B1. Therefore, as put forth by the plaintiffs, they will be entitled to obtain 1/5 share each in the plaint A schedule property as the legal heirs of Alamelu Ammal. However, the defendants have resisted the plaintiffs' suit as regards the plaint A schedule property by putting forth the case that Alamelu Ammal had executed the settlement deed in respect of the plaint A schedule property on 06.08.1992 in favour of her sons, namely, the third defendant Pavadai and another son by name Raja. The abovesaid settlement deed has been marked as Ex.B6. According to the defendants, Raja having died, his share had been inherited by his father namely the first defendant. Therefore, it is found that the defendants had resisted the plaintiffs' claim of share in the plaint A schedule property by projecting Ex.B6 settlement deed. The plaintiffs have stiffly challenged the truth and validity of Ex.B6 settlement deed in toto and in such view of the matter, the burden is heavy upon the defendants to establish that the Alamelu Ammal had indeed executed the settlement deed Ex.B6 in respect of the plaint A schedule property in favour of her sons namely the third defendant and Raja [deceased son]. It is the specific case of the plaintiffs that Alamelu Ammal had died in the year 1991 itself and on the other hand, according to

the defendants, Alamelu Ammal had executed the settlement deed Ex.B6 on 06.08.1992 and therefore put forth the case that she died only after the execution of the settlement deed marked as Ex.B6. To establish the death of Alamelu Ammal in 1991 or the death of Alamelu Ammal after the execution of Ex.B6 settlement deed in the year 1992 or thereafter, her death certificate has not been filed by either of the parties. However, as rightly determined by the first appellate court, when the factum of the death of Alamelu Ammal is not an issue and the only issue is as to when she actually died, whether during 1991 or after the execution of Ex.B6 settlement deed, in such view of the matter, as rightly determined by the first appellate court, the invocation of section 107 of Indian Evidence Act would not apply to the abovesaid scenario and in such view of the matter, the trial court is found to have erred in relying upon section 107 of the Indian Evidence Act and thereby further erred in shifting the burden upon the plaintiffs to establish that Alamelu Ammal had died in the year 1991 as putforth by them.

10. As rightly determined by the first appellate court, when according to the defendants, Alamelu Ammal was alive on 06.08.1992 i.e., on the date when Ex.B6 settlement deed was executed and by way of the abovesaid settlement deed, the defendants endeavour to deprive the share to which the plaintiff would be entitled to obtain in the plaint A schedule property as the legal heirs of Alamelu Ammal, it is for the defendants to establish that Alamelu Ammal had died after the execution of Ex.B6 settlement deed and that she had really executed Ex.B6 settlement deed with the intention of settling the plaint A schedule property in favour of the third defendant and her another son namely Raja.

11. On a perusal of Ex.B6 settlement deed, it is found that the said document is found to have been attested by two witnesses namely the deceased first defendant and by one S.Murugesan, S/o Sathyan. The said document has been written by one Ravi. Alamelu Ammal had fixed her LTI in the abovesaid document. Inasmuch as, Ex.B6 settlement deed has been totally impugned by the plaintiffs and putforth the case that the same had not been executed by Alamelu Ammal and the said document is a fabricated record, in the normal course of events, to establish the veracity and validity of Ex.B6 settlement deed as per law, the defendants should have examined the attestors of the document to prove that Alamelu Ammal was alive on 06.08.1992 and she was in a fit state of mind on the date of execution of Ex.B6 settlement deed and on her own volition, by way of the abovesaid document willingly settled the plaint A schedule property in favour of the third defendant and another son Raja. Inasmuch as the first defendant had expired, it is seen that the

defendants would not be in a position to examine him to sustain their case. It is not the case of the defendants in the written statement that the other attesor S.Murugesan had died. Despite the same, the defendants had not endeavored to examine the other attesor S.Murugesan to establish the truth and validity of Ex.B6 settlement deed. On the other hand, they had chosen to examine the identifying witness in the Registrar's Office namely Sithalingam as D.W.2. D.W.2, during the course of his evidence has admitted that at the time when Ex.B6 settlement deed was written, he was not present and he came only subsequently later, however he would claim that the settlement deed had been executed by Alamelu Ammal by affixing her LTI and that the said document had been attested by Murugesan and Govindha Gounder. According to D.W.2, he had signed as an identifying witness at the time of the registration of Ex.B6 settlement deed. When as admitted by D.W.2, he was not present at the time when Ex.B6 was written, his bald claim that he had witnessed the execution of the said document by Alamelu Ammal and the attestation of the said document by the attestors as such cannot be readily accepted. If really, D.W.2 was present at the time of the execution of the said document by Alamelu Ammal, nothing would have prevented the defendants from obtaining his signature as one of the attestors to the said document. However, D.W.2 is found to have only signed as the identifying witness in the Registrar's office at the time of the registration of the said document. When according to the plaintiffs, Alamelu Ammal was not even alive on 06.08.1992, in such view of the matter, as rightly determined by the first appellate court, D.W.2's evidence could not be the basis for upholding the truth and validity of Ex.B6 settlement deed as per law.

12.As abovenoted, it is not the case of the defendants that the other attesor Murugesan is not alive. However, D.W.1, the third defendant during the course of his evidence in the re-examination would claim that both the attestors of Ex.B6 settlement deed had died and further he has also deposed that Murugesan died seven years ago and further admitted that he has not filed any death certificate of Murugesan and denied the suggestion putforth by the plaintiffs that Murugesan is alive and deliberately the defendants had avoided him from examining him as a witness in support of their case as regards the truth and validity of Ex.B6 settlement deed. In such view of the matter, when it is found that the defendants had not established the death of the attesor Murugesan as per law and had not endeavored to establish the truth and validity of Ex.B6 settlement deed as per law by examining one of the attestors to the same and also failed to establish that Alamelu Ammal was alive on 06.08.1992, the date of the execution of Ex.B6 settlement deed and in such view of the matter, the defendants

cannot be allowed to resort to the provisions of section 69 of the Indian Evidence Act to establish the truth and validity of Ex.B6 settlement deed by the other witnesses as contemplated thereunder. In the decision reported in 2017 SCC online Madras 597 [Durga Bai and others Vs. C.S.Pandaari Bai and another] it has been held that only on establishing that the attestors are dead or not available for the examination one way or the other, only in such circumstances, section 69 of the Indian Evidence Act could be resorted to and the above position of law has also been followed by me in the judgment rendered by me on 21.02.2019 in S.A.No.1585 of 2005.

13. In the light of the above position, when the defendants had not come forward with the case that the attesor Murugesan had died in the written statement and not established the factum of his death by producing his death certificate and when the factum of his death is being disputed by the plaintiffs and when D.W.2 is found to be not a natural witness to the execution Ex.B6 settlement deed by Alamelu Ammal and he had only signed as an identifying witness in the Registrar's Office and would be not competent to speak about the execution of Ex.B6 settlement deed by Alamelu Ammal and the attestation of the same by the attestors concerned, in such view of the matter, no reliance at all could be placed upon the evidence of D.W.2 for upholding that the said deed had been really executed by Alamelu Ammal as claimed by the defendants. When the factum that Alamelu Ammal herself was alive on 06.08.1982 is being challenged by the plaintiffs and when according to the defendants Alamelu Ammal was alive and executed Ex.B6 settlement deed as put forth by them, in such view of the matter, the defendants, in order to sustain their case based on Ex.B6 settlement deed, at the foremost, should establish that Alamelu Ammal was alive on 06.08.1992. The abovesaid primary fact having not been established by the defendants and furthermore when the defendants have also failed to establish the execution of Ex.B6 settlement deed by Alamelu Ammal, through the attestors to the said document and also when the defendants have not endeavored to examine the scribe of the settlement deed, Ravi, despite his availability, one way or the other, all would go to show that as rightly determined by the first appellate court, the case of the defendants that Ex.B6 settlement deed had been executed by Alamelu Ammal in favour of the third defendant and her another son Raja, as such, cannot be accepted as determined by the first appellate court and therefore, in my considered opinion, no interference is called for in the determination of the first appellate court that the defendants had failed to establish the truth and validity of Ex.B6 settlement deed as per law. Ex.B6 settlement deed being found to be not a true and valid document, it is found that the plaintiffs, as the legal heirs of Alamelu Ammal, would also be entitled to claim their

share in the plaint 'A' schedule property as put forth in the plaint.

14. As regards the plaint B schedule properties, it has been admitted by the defendants that 0.24 cents in item 2 and items 5 to 7 of the plaint B schedule properties are the ancestral joint family properties of the first defendant. However, the defendants would claim that the remaining properties of the plaint B schedule and the other properties had been acquired by the first defendant Govindha Gounder out of his separate income and thereafter by way of Ex.B10 partition deed, the same had been divided amongst Govindha Gounder and his sons. As could be seen from the materials placed on record, Govindha Gounder, the first defendant is only an agriculturalist and therefore other than the agricultural income, he has no other source of income. When admittedly, certain properties are found to be owned by Govindha Gounder as his ancestral properties and when the defendants have failed to establish that the first defendant Govindha Gounder had acquired separate income other than the income derived from the ancestral family properties and furthermore, when in Ex.B10 partition deed, the properties described therein had been clearly described only as the ancestral properties belonging to Govindha Gounder and his sons and not as the separate properties of Govindha Gounder and furthermore, when there is no material placed on the part of the defendants that Govindha Gounder had treated the other properties as his separate properties and enjoyed the same solely to the exclusion the plaintiffs and others, in such view of the matter, as rightly determined by the first appellate court, the recitals contained in Ex.B10 would be binding upon the defendants and the defendants cannot be allowed to resile from the same and accordingly, it is seen that inasmuch all the properties described in the plaint B schedule properties are the joint family properties, in such view of the matter, by virtue of the amendment made in the Hindu Succession Act, it is found that the plaintiffs would be entitled to claim their lawful shares in the said properties also. The case of the defendants that the plaintiffs have been provided with good seers at the time of marriage and therefore, only to the knowledge of the plaintiffs, they had divided the properties by way of Ex.B10 partition deed, as such, cannot be accepted, sans any material pointing to the abovesaid case projected by the defendants. When at the time of Ex.B10 partition, the plaintiffs are also found to be having the shares in the properties comprised therein, the defendants are not entitled to ignore the plaintiffs and divide the same amongst themselves and in such view of the matter, it is seen that the plaintiffs are entitled to claim their due shares in the plaint B schedule properties in entirety as determined by the first appellate court.

15. In the light of the abovesaid discussions, the first appellate court is found to have analyzed the materials placed on record in the proper perceptive both on factual matrix and on legal aspects and by giving cogent and convincing reasons, rightly determined that the defendants have failed to establish the truth and validity of Ex.B6 settlement deed and also failed to establish that the Alamelu Ammal had died only after the execution of Ex.B6 settlement deed and also rightly determined that all the plaint B schedule properties are only the ancestral joint family properties as put forth by the plaintiffs and no interference is called for with reference to the said determination in any manner. In such view of the matter, the substantial questions of law formulated in the second appeal are accordingly answered against the defendants and in favour of the plaintiffs.

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

Sd/-

Assistant Registrar (Admin)

//True Copy//

Sub Assistant Registrar

mfa

To

1. The Subordinate Judge,
Subordinate Court at Kallakurichi.
2. The III Additional District Munsif,
III Additional District Munsif Court at Kallakurichi.

Copy to

The Section Officer,
VR Section, High Court, Chennai.

+1 cc to Mr.R.Subramanian, Advocate, Sr.No. 26609

+1 cc to M/s.Sarvabhauman Associates, 23815

judgment made in
S.A.No. 996 of 2005

NMI (CO)
CSL/11.06.2019