

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.06.2019
Delivered on : 19.08.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.2 of 2013
and
M.P.No.1 of 2013

Ramasamy ... Appellant
Vs

Somasundaram
rep. by Power of Attorney,
Agent Saroja,
W/o. Kaliannan,
20-A, Karuppanan Street,
R.P. Pudur,
Namakkal Taluk. ... Respondent

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree passed in A.S.No.38 of 2010 on the file of the learned Principal District Judge, Namakkal, dated 28.06.2011 confirming the Judgment and Decree passed in O.S.No.222 of 2008 on the file of the learned Subordinate Judge, Thiruchengode, dated 21.10.2009.

For Appellant : Mr.V.K. Vijaya Raghavan

For Respondent : Mr.T. Dhanya Kumar

JUDGMENT

The unsuccessful 1st defendant in the Courts below is the appellant before this Court.

2.The Second Appeal is filed against the Judgment and Decree of the learned Principal District Judge, Namakkal, in A.S.No.38 of 2010 in and by which the learned Judge had confirmed the Judgment and Decree of the learned Subordinate Judge, Namakkal, in O.S.No.346 of 2006.

3.For the ease of understanding, the parties are referred to in the same array as in the suit.

4.The brief facts which are necessary to determine the

Substantial Questions of Law involved in the Second Appeal are culled out as follows:

The admitted facts in the above Second Appeal are that the suit property originally belonged to one Pavayammal who had purchased the said property under a Sale Deed dated 17.06.1991, marked as Ex.B.2 in the proceedings. The said Pavayammal is the mother of Muthusamy whose children are the plaintiffs and one Ramasamy. The case of the plaintiff is that his paternal grandmother Pavayammal had executed a Settlement Deed in favour of his father on 26.09.1980 under Ex.A.2. Since his father was working at Malaysia he had given a Power of Attorney in favour of his elder son Ramasamy under the Power of Attorney dated 29.09.1980 marked as Ex.A.3. Thereafter, it appears that certain issues arose constraining his father to cancel the Power of Attorney given to his son Ramasamy by a Cancellation Deed dated 02.03.2004 marked as Ex.A.4. Thereafter, the father Muthusamy, had himself executed a registered Settlement Deed dated 04.03.2004 settling the suit property on the plaintiff who is his younger son. The Settlement Deed has been marked as Ex.A.1. The plaintiff would contend that while executing the Power, his father had authorised his son Ramasamy to either reside in the property or let it out to the third parties and collect the rents deposited into the Court.

5.The defendants 2 to 8 had been inducted by the Power Agent. Using the Power, the Power Agent had got a patta in his favour under Ex.B.1. When the father came to learn that his power agent who is none other than his son, was asserting ownership rights over the suit property, he had canceled the Deed. After the power Deed was canceled, it appears that the said Ramasamy had inducted the 1st defendant, his father-in-law into the property. After the Settlement Deed was executed in his favour, the plaintiff had requested all the tenants including the 1st defendant to vacate and hand over the possession to him immediately. Though initially they had agreed to vacate, however, in the 2nd week of September 2004, the defendants had categorically informed the plaintiff that they will not vacate the premises. This had constrained the plaintiff to file the suit primarily and also on account of the fact that the 1st defendant was asserting the right over the property.

6.The 1st defendant who alone contested the suit filed a Written Statement inter alia denying the various contentions raised in the Plaint. He would state that the property was given to his son-in-law Ramasamy (the brother of the plaintiff) by his grandmother Pavayammal. It is his case that Ramasamy has been in enjoyment of the said property ever since 1980. He would further go on to state that even assuming that Pavayammal executed a Settlement Deed in favour of the 1st plaintiff's father

Muthusamy, the said deed was never acted upon and the possession continued to be with Ramasamy. According to the defendants, the plaintiff was never in possession of the property and even the pleading of constructive possession was only made with an intent to buttress the plaintiff's case. The 1st defendant would go on to state that his son-in-law Ramasamy had executed a Power of Attorney in favour of Subramani, who in turn sold the property to the 1st defendant under the Sale Deed dated 05.05.2004.

7. An Additional Written Statement has also been filed by the 1st defendant inter alia contending that the property belonged to Pavayammal for over the statutory period and after that, his son-in-law Ramasamy was also in enjoyment of the same well over the statutory period and therefore, had prescribed title to the suit schedule property. He would once again reiterate that though Pavayammal has executed a Settlement Deed in favour of her son Muthusamy, the same was never acted upon. The 1st defendant would further contend that the suit filed without impleading his son-in-law Ramasamy was bad on account of non joinder of necessary parties.

8. The plaintiff has filed a reply denying the contentions raised in the Additional Written Statement and contending that on 05.05.2004, Ramasamy did not have any authority to execute the Deed in favour of his father-in-law and that except for being the Power Agent, he had no right or title or interest over the property authorising him to create interest in favour of third parties.

9. The learned Subordinate Judge, Thiruchengode, had framed the following issues;

- (1) Whether the property belongs to the plaintiff?
- (2) Whether the plaintiff is entitled to declaration and recovery of possession?

10. The learned Judge after a detailed enquiry decreed the suit by holding that the 1st defendant's son-in-law had no authority whatsoever to execute the Power of Attorney after cancellation of the Power in his favour by Muthusamy and thereafter, selling the property to his father through the Power Agent, who has been appointed contrary to the terms of the Agreement. Aggrieved over the same, the 1st defendant had challenged the Judgment and Decree before the learned Principal District Judge, Namakkal, in A.S.No.38 of 2010. The learned Principal District Judge also confirmed the Judgment and Decree of the trial Court. Aggrieved by this concurrent Judgment and Decree, the 1st defendant is before this Court.

11. While admitting the Second Appeal, the following Substantial Questions of Law were framed;

- "1) Whether Ex.A1 settlement deed dated

04.03.2004 has not been proved in the manner known to law complying with the mandatory requirements found in Section 68 of the Evidence Act?

2) Whether the Courts below have committed an error in rejecting the plea of the appellant/first defendant that the settlement deed dated 04.03.2004 was not acted upon in the absence of sufficient evidence on the side of the plaintiff to show that the settlement deed was acted upon?

3) Whether the Courts below have committed an error in rejecting the plea of the appellant that the suit is bad for non-joinder of necessary party?

12.Mr.V.K.Vijayaragavan appearing on behalf of the 1st defendant, would contend that on a reading of the Plaint, it would be clear that the plaintiff's case is absolutely erroneous and that at no point of time, the plaintiff was in possession of the property. On the contrary, the plaintiff would himself admit the possession of the 1st defendant. He would further argue that Ex.A.1 - Settlement Deed under which the plaintiff claims an absolute title to the suit property was not proved in the manner known to law. The witnesses who are necessary to prove Ex.A.1 - Settlement Deed have not been examined. In support of these contentions regarding the execution of Settlement Deed, the learned counsel has relied upon the following Judgments:

- (1) 2001-1- L.W.574
Rosammal Issetheenammal Fernandez (dead) by Lrs. and others v. Joosa mariyan Fernandez and others
- (2) 2012 (4) CTC 639
Valliammal and another v. Sokkammal

13.The learned counsel would further argue that even assuming without admitting the documents had been executed, it was never acted upon since the Settlor and the Settlee are both at Malaysia and therefore, the possession by the 1st defendant's son-in-law continued. In support of his arguments, he had relied upon the Judgment of the Hon'ble Supreme Court reported in AIR 2000 Supreme Court 1203 [Subhra Mukherjee and another v. Bharat Coking Coal Limited and others].

14.Per contra, Mr.T.Dhanya Kumar, learned counsel would argue that the 1st defendant has not spelt out as to how his son-in-law had got title to the property. Further, the Power of Attorney in favour of Subramani and the sale in favour of the 1st defendant have been executed after revocation of Power by Muthusamy. He would also argue that once it is admitted that

the property belongs to Pavayammal then the execution of the Settlement Deed by her in favour of Muthusamy would automatically clothe the plaintiff with title to the property. He would contend that both the Courts below have rightly analysed the evidence on record and decreed the suit.

15. Heard the learned counsel appearing for the appellant and the learned counsel for the respondent and perused the material on record.

16. Both the parties trace their title to Pavayammal, the grandmother of the plaintiff and Ramasamy, the son-in-law of the 1st defendant herein. Admittedly, Pavayammal had executed a Settlement Deed in favour of her son Muthusamy, the father of the plaintiff and Ramasamy as early in the year 1980. This Settlement Deed has not been questioned by the 1st defendant's son-in-law to date. On the contrary, he has been appointed as Power Agent of his father within three days the property being settled in favour of the father. It was only when the 1st defendant's son-in-law Ramasamy had started asserting ownership right over the suit property that his father had revoked the Power of Attorney given to him. The father had thereafter himself executed a Settlement Deed dated 04.03.2004 in favour of the plaintiff under Ex.A.1. The 1st defendant who claims that his son-in-law had got a right over the suit property has not spelt out as to how his son-in-law had come into ownership of the property.

17. In the Written Statement, the 1st defendant would only contend that his son-in-law had got the property through his paternal grandmother in the year 1980 (however, the manner in which he has got the right has not been spelt out) and since then he has been in possession and enjoyment of the same. This statement has not been supported by any document. On the contrary, the plaintiff is able to trace his title to the Settlement Deed executed by his grandmother in favour of his father Ex.A.2 and thereafter, the settlement by his father in his favour under Ex.A.1. Therefore, the title has passed to the plaintiff and he is the true and absolute owner of the suit property. As regards the possession, the property has been let out to the tenants and the tenants are in possession of the said property and therefore, the plaintiff is deemed to be in constructive possession of the said property. The induction of the tenants into the property by the 1st defendant's son-in-law Ramasamy is only in the capacity of the Power Agent of Muthusamy.

18. The 1st defendant is challenging the Settlement Deed in favour of Muthusamy on the ground that it was not acted upon and the possession was never given to him. It is an admitted fact

(not denied by the defendants) that Muthusamy as soon as the property was settled in his favour by his mother had executed a Power of Attorney in favour of his son stating that since he is employed in Malaysia he would not be in a position to take care of his property and therefore, he was appointing his son as his Power Agent. Ramasamy, who is the 1st defendant's son-in-law who claims ownership to the property, has not challenged the Settlement Deed executed in favour of his father by his grandmother. Therefore, it can be presumed that the said Ramasamy has accepted the Settlement Deed in favour of his father. Therefore, the title had been transferred in favour of Muthusamy and Muthusamy had become the absolute owner of the property. As the absolute owner of the property, he has thereafter executed the said Settlement Deed in favour of his son, the plaintiff herein. The Settlement Deed Ex.A.1 is a registered document.

19. In the Judgment relied upon by the appellant, namely, 2001-1- L.W.574 [Rosammal Issetheenammal Fernandez (dead) by Lrs. and others v. Joosa mariyan Fernandez and others], the Hon'ble Supreme Court has held that the proviso under Section 68 provides that if a document is in question, is required by law to be attested, then such a document need to be proved by examining the attesting witnesses only if there is a specific denial about the execution.

20. A perusal of the Written Statement would clearly indicate that the execution of Settlement Deed has not been denied but, it is only the authority of the Settlor to execute the Settlement Deed which has been questioned and further, the Settlement Deed is questioned on the ground that it has not been acted upon. Therefore, the Judgment reported in 2001-1- L.W.574 [Rosammal Issetheenammal Fernandez (dead) by Lrs. and others v. Joosa mariyan Fernandez and others] is not applicable to the facts on hand similar is the case of the Judgment in 2012 (4) CTC 639 [Valliammal and another v. Sokkammal].

21. As already discussed, the Settlor Muthusamy had become the owner of the property vide a Settlement Deed executed by the true and admitted owner Pavayammal. Therefore, the Settlement Deed executed by him in favour of the plaintiff is very much valid and binding on all the parties.

22. Considering the fact that the plaintiff is the owner of the property and the Sale Deed in favour of the defendants has been executed by a person who has no title to the properties. The defendant is bound to hand over the possession of the property to the plaintiff. The Substantial Questions of Law are answered in favour of the plaintiff.

This Second Appeal is dismissed. The Judgment and Decree of the Courts below are confirmed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-IV)

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Sub Assistant Registrar

mps

To

1.The Principal District Judge,
Namakkal.

2.The Subordinate Judge,
Thiruchengode.

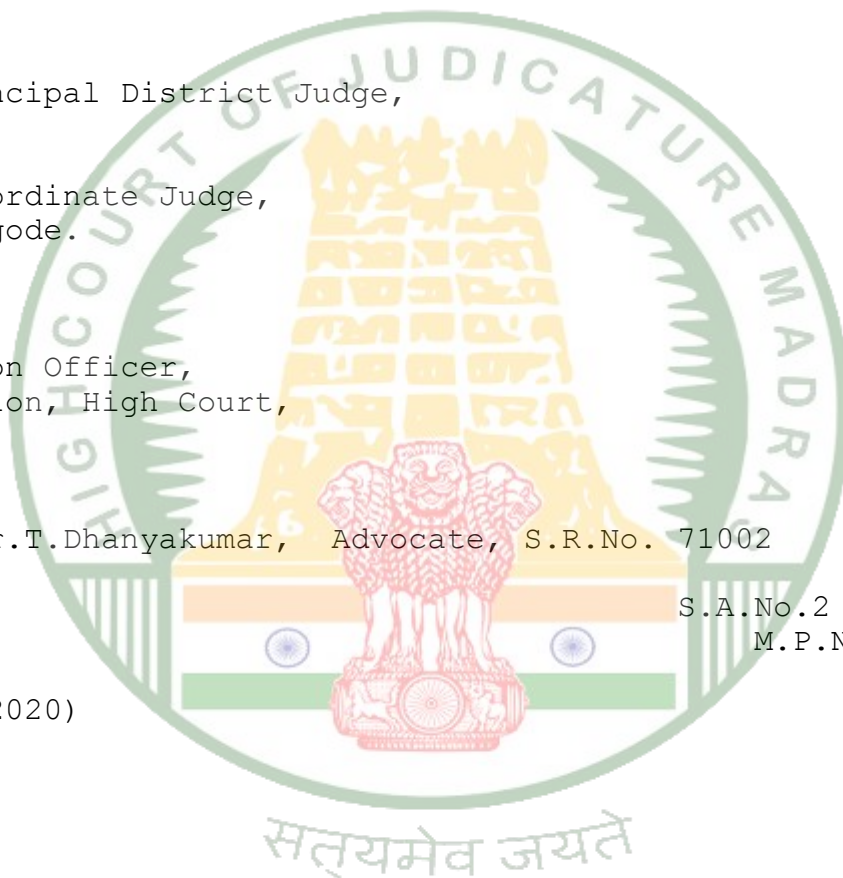
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The Section Officer,
V.R. Section, High Court,
Madras.

+1cc to Mr.T.Dhanyakumar, Advocate, S.R.No. 71002

S.A.No.2 of 2013 and
M.P.No.1 of 2013

MR (CO)
GN (13/02/2020)



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