

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.11.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.375 of 2014 &
M.P.Nos.1 and 2 of 2014

Elumalai ..Appellant/Respondent/Defendant

Vs.

Ashokan ..Respondent/Appellant/Plaintiff

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 20.11.2013 in A.S.No.1 of 2013 on the file of the learned Subordinate Judge, Arani, against the judgment and decree dated 18.12.2012 in O.S.No.332 of 2009 on the file of the learned District Munsif, Polur.

For Appellant : Mr.M.K.Thalapathy for
Mr.M.Sriram

For Respondent : Mr.J.Arun Prasad

J U D G M E N T

The defendant in O.S.No.332 of 2009 has come up with this appeal, aggrieved by the judgment of the lower appellate Court in A.S.No.1 of 2013, in and by which the lower appellate Court reversed the judgment of the trial Court in O.S.No.332 of 2009 and granted a decree for declaration of title and permanent injunction in favour of the plaintiff/respondent.

2. According to the plaintiff/respondent, the suit properties belonged to his paternal grandfather namely Munusamy Gounder by virtue of the sale deed dated 22.03.1990. By a registered instrument of settlement deed dated 19.03.2008, the said Munusamy Gounder had settled the suit properties on the plaintiff and from the date of the said settlement, the plaintiff is in possession of the property as absolute owner. Since the defendant who is his paternal uncle attempted to interfere with his peaceful possession of the property, the plaintiff has come up with the above suit.

3. The suit was resisted by the defendant contending that the settlement deed is not true and valid. It was further claimed that the suit properties are the properties of ancestral joint family consisting the defendant himself, Munusamy Gounder, the plaintiff's father and Muniyammal, daughter of the Munusamy Gounder. He would further contend that Munusamy Gounder and his children namely the defendant, father of the plaintiff Pachiyappan and Muniyammal, the daughter of Munusamy Gounder together sold the ancestral property on 06.01.1990 for a consideration of Rs.7,500/- and that consideration along with the monies contributed out of the joint family income formed nucleus for purchase of the suit properties. Therefore, according to the defendant, the suit properties are ancestral properties and Munusamy Gounder had no independent right to settle the suit properties on the plaintiff. On the above contentions, the defendant sought for dismissal of the suit.

4. At trial, the plaintiff has examined himself as P.W.1. The executor of the settlement deed dated 19.03.2008 has been examined as P.W.2. The father of the plaintiff Pachiyappan was examined as P.W.3. The attestors of the settlement deed dated 19.03.2008 were examined as P.W.4 and P.W.5. On the side of the defendant, the defendant was examined as D.W.1 and M/s.Narayanan and Kannan were examined as D.W.2 and D.W.3. The plaintiff filed Exs.A1 to A13 on his side.

5. The trial Court on a consideration of the evidence on record concluded that the plaintiff has not proved the execution of the settlement deed dated 19.03.2008 as required under Section 68 of the Indian Evidence Act. In support of the said conclusion, the trial Court relied upon the evidence of executor namely Munusamy Gounder and the attesting witness namely Pachiyappan and Sivan examined as P.Ws.4 and 5. The trial Court pointed out the discrepancies in their evidence and concluded that the plaintiff has not satisfactorily established the execution of the settlement deed dated 19.03.2008 which is marked as Ex.A1. On the said finding, the trial Court found that the plaintiff was not entitled to decree as prayed for and dismissed the suit. Aggrieved, the plaintiff preferred an appeal in A.S.No.1 of 2013 on the file of the Subordinate Court, Arni, Thiruvannamalai District. The learned Subordinate Judge on re-appreciation of the evidence disagreed with the trial Court and found that the execution of the settlement deed has been proved. The lower appellate Court also rejected the contention of the defendant that the suit properties are the ancestral properties. On the aforesaid conclusion, the lower appellate Court allowed the appeal and decreed the suit as prayed for. Aggrieved, the defendant is on appeal.

6. The following substantial questions of law were framed at the time of admission:

- i) Whether the First Appellate Court is correct in giving a finding against the oral evidence of P.W.2 who himself has admitted that he has not executed any documents but the First Appellate Court has given a finding that P.W.2 has executed Ex.A1 which is the Settlement Deed based on which the respondent/plaintiff is praying for a decree?
- ii) Whether the First Appellate Court is correct in reversing the well considered judgment of the trial Court regarding the factum of possession?

7. I have heard Mr.M.R.Thalapathy, learned counsel for the appellant and Mr.J.Arun prasad, learned counsel for the respondent.

8. Elaborating on the questions of law framed, Mr.M.R.Thalapathy, learned counsel appearing for the appellant would contend that the lower appellate Court was not right in concluding that the execution of the settlement deed Ex.A1 has been proved in accordance with law. Drawing my attention on the evidence of P.Ws.2, 4 and 5, particularly the cross examination, the learned counsel would contend that the lower appellate Court has miserably failed to read the evidence in the proper perspective and the lower appellate Court has proceeded on assumptions and surmises to conclude that the settlement Deed has been proved in accordance with law. The learned counsel would also submit that the lower appellate Court was not in right in concluding that the suit properties are separate properties of Munusamy Gounder. He would also point out that the said Munusamy Gounder and his children had sold the ancestral property on 06.01.1990 for consideration of Rs.7,500/-. Therefore, according to him, the lower appellate Court was not right in concluding that the suit properties are self acquisitions of Munusamy Gounder.

9. Contending contra, Mr.J.Arun prasad, learned counsel appearing for the respondent/plaintiff would submit that the lower appellate Court has reached a proper finding on the appreciation of the evidence. He would point out that P.W.2 is aged about 85 years and he has also admitted that he has less memory. Therefore, according to the counsel, the trial Court erred in relying upon his evidence to conclude that the execution of the Settlement Deed, Ex.A1 by Munusamy Gounder has not been proved in accordance with law.

10. I have considered the rival submissions.

11. It is for the plaintiff to prove Ex.A1 settlement Deed in accordance with law. The plaintiff himself has examined P.W.2 the executor of Ex.A1. The evidence of P.W.2, extracted by the trial Court, shows that he has disowned his statements in the proof affidavit. He has also categorically stated that he is inimically disposed towards the attesting witnesses. He did not execute any document which was attested by P.Ws.4 and 5. P.W.2 also deposed that he had not executed any instrument except the sale deed executed by him in favour of Renu ammal, the wife of the defendant. Similarly, P.Ws.4 and 5, the attestors have also given up the execution of Ex.A1 in their evidence. Though P.W.4 has in proof affidavit (chief examination) admitted the truth and genuineness of the document filed by the plaintiff, in his cross examination, he has given up the statement made in his proof affidavit. He specifically admitted that he has filed the proof affidavit, prepared on the instructions of the plaintiff.

12. P.W.5 Manokar who is the son of P.W.4 another attestor of Ex.A1 has specifically deposed that he has not seen any document signed by him in Court. He would also state that he has not seen the settlement Deed. He also admitted that he does not know the entire contents of the proof affidavit. The above evidence would conclusively show that the plaintiff has miserably failed to prove Ex.A1 settlement Deed executed by P.W.2 Munusamy Gounder. The lower appellate Court has completely overlooked the above evidence and on the basis of the proof affidavit and concluded that execution and attestation of the document, Ex.A1 Settlement Deed, has been established. The lower appellate Court has faulted the defendant that the witnesses have not been specifically cross examined. The cross examining counsel cannot be offered to be specific. By its very nature, cross examination has to be a round about manner so as to take the witness by surprise extract, answers in favour of the cross examining party. Therefore, the lower appellate Court in my considered opinion, was not right in faulting the defendant for there being no direct cross examination.

13. The evidence of P.W.2 would really cause serious doubt about the execution of Ex.A1 settlement deed. P.W.2 has clearly, in cross examination deposed that he had not executed any document except the sale deed executed in favour of the defendant's wife in respect of the property. He had also deposed that he did not execute any document attested by P.Ws.4 and 5. P.W.4 in his evidence stated that there are some criminal cases between the two families and he has also deposed that he does not know which is the suit property and he does not know about the truth and validity of the document filed by the

plaintiff. He further admitted that he has filed the proof affidavit only at the instance of the plaintiff. P.W.5 who is the son of P.W.4 has deposed that he has not seen any document signed by him in Court. He has further deposed that he has not seen the settlement deed and that he does not know the entire contents of the proof affidavit. This evidence, in my considered opinion, derails the case of the plaintiff regarding due execution of Ex.A1. Unfortunately, the lower appellate Court had not adverted to the cross examination of P.Ws.2, 3 and 4 and has based on the proof affidavit concluded that the plaintiff has proved the execution and attestation of Ex.A1 settlement deed. I find that the lower appellate Court's conclusions which are against the evidence on record are nothing but perverse. The lower appellate Court as a final Court of fact is bound to examine the evidence independently and come to its own conclusion. It is also expected of the lower appellate Court, being a final Court of fact to consider the reasons assigned by the trial Court, for its conclusions and if it is disagreeing with the said reasons, to disclose the reasons for such disagreement. The said exercise is totally absent in the judgment of the lower appellate Court. I, therefore find that the lower appellate Court conclusions are not supported by any material evidence.

14. Hence, the questions of law raised are answered in favour of the appellant. In view of the answers to the questions of law raised to the effect that the evidence of P.Ws.2, 4 and 5 do not prove the execution of Ex.A1 settlement Deed by P.W.2 and its attestation by P.Ws.4 and 5. The inevitable consequence is that the plaintiff has not proved the execution of Ex.A1 settlement deed. Once it is held that the plaintiff has not proved the execution of the settlement deed Ex.A1, the plaintiff's suit will have to necessarily fail.

15. In view of the above, the second appeal is allowed. The judgment and decree of the lower appellate Court are set aside and that of the trial Court are restored. Consequently, connected miscellaneous petitions are closed. No costs.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

vum

To

1. The Subordinate Judge,
Arani.

2. The District Munsif,
Polur.

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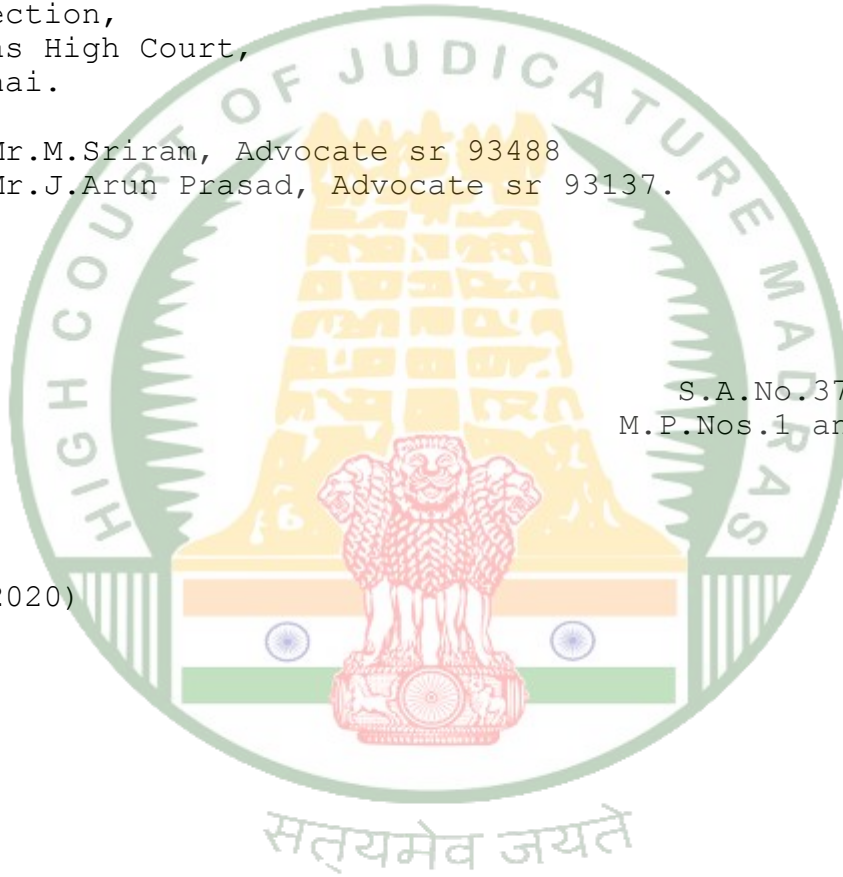
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Madras High Court,
Chennai.

+1 CC to Mr.M.Sriram, Advocate sr 93488

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PPA (CO)
SP (09/06/2020)



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