BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **31.10.2019**

CORAM :

THE HONOURABLE Ms.JUSTICE **P.T.ASHA**

S.A.(MD) No.140 of 2015

Jacob Nadar : Appellant/Respondent/Plaintiff

vs.

Kalavathy : Respondent/Appellant/Defendants

Prayer:- Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree passed in A.S.No.27 of 2011 on the file of the learned Subordinate Judge, Valliyoor, dated 21.02.2014 reversing the judgment and decree in O.S.No.304 of 1998 on the file of Principal District Munsif Court, Valliyoor, dated 04.08.2010.

For Appellant : Mr.M.P.Senthil
For Respondent : Mr.V.Meenakshi Sundaram

JUDGMENT

The plaintiff in a suit in O.S.No.304 of 1998 for declaration and recovery of possession is the appellant before this Court.

2.The above second appeal is filed challenging the judgment and decree passed in A.S.No.27 of 2011 on the file of the learned Subordinate Judge, Valliyoor, reversing the judgment and decree in O.S.No.304 of 1998 on the file of Principal District Munsif Court, Valliyoor, dated 04.08.2010.

3.The suit in O.S.No.304 of 1998 on the file of the Principal District Munsif Court, Valliyoor, is filed for the following reliefs:

a) *for a declaration that the plaintiff is entitled to the schedule property and for a consequential recovery of possession directing the defendant to hand over vacant possession of the schedule property to the plaintiff within a date to be fixed by this Honourable Court and in default by the defendant the same may be done through Court;*

b) *directing the defendant to pay means profits to the plaintiff from the date of plaint to the date of delivery;*

4.The suit was filed with reference to the following property:

Tirunelveli District - Radhapuram Taluk - Thisayanvilai Town Panchayat Wart No.2 - the house made up of mud walss and thatched roof bearing Door No.5-A (previously Dr.No.5 in ward No.4)

5.The parties are referred to in the same array as in the suit in O.S.No.304 of 1998.

PLAINTIFF'S CASE:

6.The plaintiff would contend that the suit house was gifted to him by his father under a gift deed dated 19.06.1979. He had accepted the gift and has been in possession and enjoyment of the same. The property was

originally assigned as D.No.5 and thereafter, it was changed to D.No.5A. The house tax receipt and the house tax document register all stood in the name of the plaintiff till 31.08.1997.

6.1.The plaintiff would further contend that the defendant who is none other than his elder sister's daughter was permitted to occupy the suit property 10 years prior to the filing of the suit ie., in the year 1988 free of rent. It appears that the defendant with a view to usurping the property had obtained the signature of the plaintiff in a blank sheet informing him that she required the signature for getting the water service connection to the suit property. The plaintiff had fabricated a release deed since the defendant had hidden the fact that the signature was obtained in stamp papers by folding the stamp portion. The defendant had later created a release deed from out of this document and submitted the same to the authorities and obtained the transfer of the house property tax into her name. This fact came to the knowledge of the plaintiff when he went to pay the house tax in the month of March 1998 where he was informed that the tax receipt in respect of the property stood in the name of the defendant.

6.2.The objections to the Executive Officer of the Panchayat, District Collector and the Thasildar did not yield the desired result since the Executive Officer had stated that the transfer had taken place only on account of the release deed that has been executed by the plaintiff. The plaintiff thereupon demanded the defendant to vacate the premises which was refused by the defendant and therefore, the plaintiff was constrained to issue the legal notice dated 16.06.1988, calling upon the defendant to vacate and hand over the vacant possession of the suit property. Though the notice was received by the defendant on 18.06.1988, there was no response from the defendant. Therefore, left with no other alternative, the plaintiff was constrained to file the suit in question.

DEFENDANT'S CASE:

7.The defendant after denying the above mentioned contentions has come forward with the contention that the suit schedule property originally belonged to the RC Mission and her mother had occupied the said property and constructed a thatched house 40 years prior to the filing of the suit and the defendant's mother had been residing in the said property. She would further contend that the plaintiff had got the house tax receipt without the knowledge of the defendant or her mother in the year 1997. Thereupon, a Panchayat was held where the plaintiff had admitted his mistake and the fact that he had no right to the suit property. In acknowledgment of the said submission, the plaintiff had also executed a release deed in favour of the defendant. It was on the basis of the release deed that the defendant had submitted the papers to the authorities and got the house tax receipt transferred in her name.

7.1.The defendant would further contend that the gift deed was never executed by her grandfather in favour of the plaintiff and the same was not acted upon. The defendant's case is that the suit schedule property absolutely belonged to her and she is in possession of the same as its absolute owner.

TRIAL COURT:

8.The parties had gone to trial before the learned Principal District Munsif, Valliyoor, who had framed the following issues:

> ***1.****Whether the plaintiff is having title over the suit property out of gift deed dated 19.06.1979?*
>
> ***2.****Whether the defendant is living in suit house on plaintiff's permission?*
>
> ***3.****Whether the defendant had obtained plaintiff's signature in stamped paper with evil design?*
>
> ***4.****Whether the suit property is belonging to defendant's mother?*
>
> ***5.****Whether the plaintiff is entitled to get declaration and recovery of possession as prayed for?*
>
> ***6.****To what relief the plaintiff is entitled to?*

8.2.On the side of the plaintiff, the plaintiff was examined himself as P.W1, one Sankar Ganesh was examined as P.W2 and 9 documents were marked as Ex.A1 to Ex.A9. On the side of the defendant, the defendant was examined herself as D.W1 and 9 documents were marked as Ex.B1 to Ex.B9. During trial, 3 exhibits were marked through D.W2 as Ex.X1 to Ex.X3 and the Commissioner's report and plan were marked as Ex.C1 and Ex.C2.

8.3.The learned Principal District Munsif, Valliyoor, on a consideration of the evidence both oral and documentary decreed the suit with the following stipulations:

In fine, the suit is decreed with following stipulations:

> ***i)*** *the Court hereby declares that the plaintiff has title, right, interest possession and enjoyment (by giving permissive possession to defendant) over the suit house;*
>
> ***ii)*** *the defendant should hand over the suit house to the plaintiff within one month from today and failing which, the plaintiff can execute the decree to take delivery though Court of law;*
>
> ***iii)*** *the defendant has to pay the cost of the suit to the plaintiff and;*
>
> ***iv)*** *the means profits will be decided in a separate proceedings;*

APPELLATE COURT:

9.Challenging the said judgment and decree, the defendant had filed

an appeal in A.S.No27 of 2011 on the file of the Subordinate Court, Valliyoor. The learned Subordinate Judge, Valliyoor, by his judgment and decree dated 21.02.2014, was pleased to reverse the judgment and decree of the trial Court.

9.1.The learned Subordinate Judge, Valliyoor, has primarily allowed the appeal on the ground that the plaintiff has not proved the execution of Ex.A1, gift deed, by examining the attesting witnesses and further held that the defendant's case that the property belonged to RC Mission has been probabilized by Exs.B8 and B9 since the recital of Ex.A1 does not provide the manner in which the property had devolved on the plaintiff's father and therefore, the plaintiff cannot seek to have his title declared. The learned Subordinate Judge, Valliyoor, has also proceeded to hold that Ex.B6 was only a consent letter and not a release deed, requiring registration.

SECOND APPEAL:

10.Challenging the reversing judgment and decree, the plaintiff has filed the above second appeal.

11.This second appeal has been admitted on the following substantial questions of law:

> ***1.****When the findings of the lower appellate Court are vitiated in its failure to consider that the appellant as plaintiff has discharged the initial burden of proof on the basis of the documentary evidence under Ex.A1, A2, X1 to X3 corroborating the evidence of P.W1 supported by the very admission of D.W1?*
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> ***2.****Has not the lower appellate Court committed a serious error in relying upon Ex.B6, an unregistered release deed which is not at all admissible in evidence, especially the very genuineness of Ex.B6 is disputed which was not dispelled by the respondent on the basis of any cogent evidence?*
>
> ***3.****Whether the lower appellate Court is right in law in dismissing the suit mechanically holding that the burden is on the appellant being the plaintiff in the suit even without adverting that the initial onus of proof has been discharged by the plaintiff on the basis of positive and acceptable evidence and no contra or overwhelming evidence was placed by the respondent?*
>
> ***4.****Whether the judgment rendered by the lower appellate Court is contrary to Section 103 of the Indian Evidence Act?*
>
> ***5.****Whether the findings of the lower appellate Court to rely on Ex.B6, the alleged unregistered release deed could be sustained in law, especially the very document under Ex.B6 is inadmissible in evidence?*
>
> ***6.****Whether the lower appellate Court is right in law in relying on Exs.B8 and B9 to uphold the plea of the respondent especially the said documents are not between interparties?*

SUBMISSIONS:

12.Mr.M.P.Senthil, learned counsel appearing on behalf of the appellant/plaintiff would contend that the plaintiff has established his primary title to the property by filing Ex.A1 and the tax receipt, Ex.A2 and Ex.X1 to Ex.X3. From a perusal of those documents, it is seen that the defendant who has come forward with the case that the property was originally occupied by her mother and through whom she claims right has not chosen to examine her mother and therefore, since the best evidence has been kept away from the scrutiny of the Court, adverse inference has to be drawn from the same. He would further contend that the defendant who had come forward with the case that the property originally belonged to RC Mission has not deemed it fit to examine the one official from the said Mission.

13.The learned counsel would further contend that having taken such a stand, the defendant would submit that she had got the property tax entries transferred to her name on the basis of the release deed Ex.B6. By making the said statement, the defendant has in very clear terms admitted the title of the plaintiff to the property. He would further contend that the lower appellate Court has reversed the said judgment and decree only on the basis of presumption by using Ex.B8 and Ex.B9 which are the title deeds of the persons, who are shown as the owners of the property situated on the north and east of the suit schedule property in Ex.A1, gift deed.

14.The learned counsel would further contend that the lower appellate Court has committed a grave error in holding that the plaintiff has not proved the gift deed, Ex.A1. In this regard, the learned counsel would rely on the judgment of the Hon''ble Supreme Court in the case of ***RVE.Venkatachala Gounder Vs. Arulmigu Viswesaraswami and VP.Temple*** reported in ***2004-1-L.W.728.*** In support of his argument, the learned counsel would argue that once the plaintiff has proved his title by producing a registered document and the defendant had taken out a plea that she is the owner of the property, the onus is upon her to prove as to how she claimed title to the property.

15.In support of his argument that the lower appellate Court has relied the unregistered document, the learned counsel would rely on the judgment of the Hon'ble Supreme Court in the case of ***KB.Saha and Sons Private Limited Vs. Development Consultant Limited*** reported in ***2008 (5) CTC 260***, where, the Hon'ble Supreme Court has held that the document, which requires compulsory registration, is not a registered document and it cannot be used as an evidence. However, it can be used to prove a collateral transaction, which was not available in the instant case since the defendant has claimed title on the basis of Ex.B6, which is clearly evident from paragraph 10 of the defendant's written statement and also her evidence. He would also rely on the judgment of our Court in the case of ***M.Subramani Vs. P.Shanmugam and others*** reported in ***2007 (4) CTC 125***, wherein, the learned Judge of this Court has held that the recital as the boundaries cannot be relied upon by the Court without examining the gift executance and therefore, the reliance upon Ex.B8 and Ex.B9 is totally misconceived.

16.*Per contra*, Mr.V.Meenakshisundaram, the learned counsel appearing on behalf of the respondent/defendant would contend that the plaintiff who has come forward with the suit in O.S.No.304 of 1998 for declaration is bound to prove the title to the property. He would further contend that Ex.A1, gift deed, does not give any information as to how the plaintiff's father had become the owner of the suit property.

17.The learned counsel would further contend that Ex.B8 and Ex.B9 are the sale deeds of the two owners, whose property has been shown as north and eastern boundaries in Ex.A1, release deed. A reading of these two sale deeds would clearly indicate that the property belonged to RC Mission and therefore, the learned counsel would contend that even the plaintiff's property belonged to RC Mission, there is no proof to show that as to why Samual Nadar has become the owner of the property.

18.The learned counsel would further contend that the plaintiff's suit is only based upon Ex.A1, gift deed and therefore, without proving title, the plaintiff cannot claim declaration of title to the suit property. In support of his contention, the learned counsel would rely the judgment of this Court in the case of ***S.Thiyagaraja Gurukkal and others Vs. Thirukazhukundram Aadhi Saiva Sivachariargal Sangam*** reported in ***2019 (2) MWN (Civil) 312*** by stating that the plaintiff has failed to prove the competence of his father to settle the property in his favour and therefore, the plaintiff was not entitled to a decree as prayed for by him. Therefore, the judgment and decree of the lower appellate Court is correct and does not warrant any interference of this Court.

DISCUSSIONS:

19.The issue in the suit in O.S.No.304 of 1998 on the file of the learned Principal District Munsif, Valliyoor, is with regard to the title of the plaintiff to the suit property and his right to recover possession from the defendant. The plaintiff has claimed a right to the property on the basis of Ex.A1, which is a gift deed executed by his father in his favour on 19.06.1979. From Ex.A1, it is seen that the plaintiff's father has gifted the property which is in his possession in favour of the plaintiff. This document is a registered document. The property that is conveyed is the land together with a thatched house bearing D.No.5. It is also seen that the property tax has been assessed in the name of the plaintiff till 1997 and only after 1997, the defendant by using Ex.B6, release deed, has transferred the property tax into her name. This fact is also admitted by the defendant in paragraph 10 of the written statement and evidence. The defendant who has set up the title to the property independent of the plaintiff has not proved the same.

20.The defendant had come forward with a categoric case that she claims under her mother who had occupied the property 40 years back and that she and her mother are in the possession of the property. Though the defendant would initially state that her mother is the owner of the property, she would ultimately contend that she is the absolute owner of the property on the basis of Ex.B6, release deed, in and by which, she had got the property tax transferred into her name. The defendant has not let in any evidence to disprove the gift deed executed in favour of the plaintiff on the contrary she has created Ex.B6 release deed and used it to get the suit property transferred into her name. From a reading of Ex.A2 and Ex.X1 to Ex.X3, it is clear that the plaintiff was in possession of the suit property as its owner. This ownership is tacitly acknowledged by the defendant, who on the strength of Ex.B6 has get the house tax entry transferred to her name and which fact has been clearly admitted by her in para 10 of her written statement, which reads as follows:

> *10....... The defendant submitted the said release deed before the Executive Officer, Tisaiyanvilai Town Panchayat and change the name in the schedule house and she is paying house tax regularly in her name. The plaintiff also admitted the said unregistered release deed in this case also and also admitted his signature in the said release deed. At this juncture, it is clearly shows the said release deed is never fabricated by the defendant.*

21.The plaintiff has produced the registered gift deed which is of the year 1979 and coupled with the house tax receipts, it proves the plaintiff's title to the suit property. The fact that the defendant has kept away her mother from the witness box and also failed to examine any official from the RC Mission, it is clear that the defendant has no title to the suit property. Having admitted that the house tax receipts were assessed in the name of the plaintiff till such time as the same was transferred into her name ie., in the year 1997, the defendant has acknowledged the fact that she has been put in possession only under the plaintiff. The lower appellate Court has over looked the registered gift deed, house tax receipt and evidence of D.W1 and this mistake has affected the whole decision.

22.In the result, this Second Appeal is allowed and the substantial questions of law are answered in favour of the plaintiff. The judgment and decree in A.S.No.27 of 2011 on the file of the learned Subordinate Judge, Valliyoor, reversing the judgment and decree in O.S.No.304 of 1998 on the file of Principal District Munsif Court, Valliyoor, dated 04.08.2010 is hereby set aside. No costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar(CS)

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To

1.The Subordinate Judge,
  Valliyoor.

2.The Principal District Munsif,
  Valliyoor.

Copy to: The Record Keeper,
         V.R. Section,
         Madurai Bench of Madras High Court,
         Madurai.(2)

+1 CC to M/s.M.P.SENTHIL, Advocate SR-95428.
+1 CC to M/s.D. NALLATHAMBI, Advocate SR-95644.

S.A.(MD) No.140 of 2015
31.10.2019

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