



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 06.11.2020

Pronounced on: 21.11.2020

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THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

Second Appeal No.859 of 2009
& M.P.Nos.1 & 2 of 2009

1. Lakshminarayanan
 2. Rajasekharan @ Vijayasekharan
 3. Ramakrishnan
 4. Ranganathan
All sons of Govarthanavasan,
All residing at Punjai Thuraiyampalayam,
Gobi Taluk,
Erode District.
- ... Appellants/Plaintiffs
- /versus/

Family Manager V.Suriyanarayanan,
S/o.V.A.Venkatrama Chettiar,
No.1/65, Main Road,
Bhavani

...Respondent/1st Defendant

Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, 1908, against the judgment and decree dated 20.04.2005 made in A.S.No.77 of 2004 on the file of the Sub Court, Bhavani reversing the judgment and decree dated 21.07.2004 made in O.S.No.271 of 2004 on the file of the I Additional District Munsif Court, Bhavani.

For Appellants :Mr.T.Murugamanikam, Senior Counsel
for M/s.Zeenath Begum

For Respondent : Mr.N.Manokaran

J U D G M E N T

(The case has been heard through video conference)

The plaintiffs in the Original Suit are before this Court are Appellants. Against the judgment of the First Appellate Court reversing the judgment of the Trial Court allowing the suit, hence the present Second Appeal is filed.



2. The parties are referred as per the rankings and designation shown in the plaint.

The case of the plaintiffs:

The property which is the subject matter of the suit is the property of V.A.Venkatarama Chettiar. The said Venkatarama Chettiar had two sons V.Suryanarayanan and P.V.Govarthanavasan, who are the defendants in the suit. The plaintiffs are the grandsons of V.A.Venkatarama Chettiar born to P.V.Govarthanavasan.

3. On 29.12.1972, the said Venkataram Chettiar settled the said property by way of a registered settlement deed dated 29.12.1972 in favour of the plaintiffs. At the time of the settlement, the plaintiffs were minors. The 2nd defendant as their guardian took possession of the property on their behalf. The settlement deed came into force immediately and acted upon. The said Venkatarama Chettiar died on 28/02/1973. When the 1st defendant in the year 1975 requested for accommodation, the 2nd defendant let out the demise premises for a rent of Rs.150/- p.m to the first defendant. In the year 1982 when the property got dilapidated, the first defendant was asked to vacate and hand over the premises to carry out repair work. The first defendant refused to vacate and also tried to alter the physical feature of the demise premises, hence eviction proceedings before the Rent Control Tribunal at Bhavani in R.C.O.P.No.5/1982 for eviction and a Civil Suit for injunction in O.S.No.263/1983 on the file of District Munsif Court at Bhavani was filed by the plaintiffs through their father against the first defendant. The eviction petition R.C.O.P.No.5/1982 was dismissed for want of jurisdiction on the ground that there is substantial dispute regarding title. The said findings of the Tribunal was confirmed by the Appellate Authority in R.C.A.No.24/1983 and also by the High Court in C.R.P.No.4907 of 1984. The Civil Suit was filed for injunction was dismissed for default.

4. In the year 2000, the plaintiffs came to know about the fate of the cases filed against the first defendant by the second defendant on their behalf. Therefore, the suit to declare the registered settlement deed dated 29.12.1972 as valid and the plaintiffs have derived title over the suit property through the said settlement deed and consequentially for delivery of possession.

5. Case of the first defendant:

The suit property not settled to the plaintiffs by the alleged deed dated 29/12/1972. The execution, attestation and registration of the said settlement deed is denied. The defendant was living in the suit property along with his father Venkatarama Chettiar for about 40 years and during the life time of Venkatarama Chettiar, he executed a Will dated 06.06.1970 in



favour of this defendant and got it duly registered. This defendant enjoying the property absolutely after the demise of Venkatarama Chettiar. The plaintiffs have no right in the property. He is not tenant under the plaintiffs as alleged. The plea of landlord tenant relationship was denied and contested before the Rent Control Tribunal and same was accepted by all the three courts. On the dismissal of the C.R.P.No.4708/1984 the issue had reached finality as early as 15/04/1991. Likewise, in the suit filed for injunction this defendant in his written statement specifically denied title and possession of the plaintiffs. After completion of pleadings, the plaintiffs did not pursue the suit and allowed it to be dismissed for default. Even if there was any settlement deed executed by Venkatarama Chettiar it was never acted upon. This defendant has perfected the title by adverse possession by open, hostile and continuous possession without any interruption by the plaintiffs for more than 25 years. Hence, recovery of relief hit by Article 65 of the Limitation Act.

6. The Trial Court framed the following issues:-

1. Whether the first defendant enjoying the suit property as its absolute owner based on the will of Venkatarama Chettiar dated 06/06/1970?

2. Whether the plaintiffs are entitled for the declaration as prayed ?

3. What other relief ?

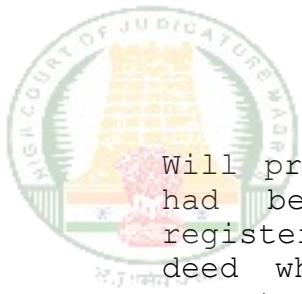
Additional issues:

1. Whether the first defendant had perfected title by adverse possession ?

2. Whether the suit is hit by res judicata in view of the decision in RCOP 5/1982?

7. Before the Trial Court, P.W-1 to P.W-5, Ex.A-1 to Ex.A-9 for plaintiffs and D.W-1 & D.W-2, Ex.B-1 to Ex.B-22 for the defendants and Ex.C-1 and Ex.C-2 were relied by the parties in support of their respective case.

8. The Trial Court allowed the suit and granted the relief prayed. It held that the earlier proceeding between the parties before the Rent Control Tribunal which is not competent to decide title dispute will not act as res judicata for the present suit laid for the relief of declaration. Both the parties are relying upon the Secondary evidence viz., the registered copy of the Settlement Deed (Ex.A-2) and the Will (Ex.B-1). For non-production of the original deeds, both have come out with some explanation. The procedure laid in Section 68 of the Indian Evidence Act not complied in case of Ex.B-1



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Will propounded by the first defendant. Further, the said Will had been expressly cancelled through subsequent document registered as Document No.57 of 1972. Therefore, the settlement deed which is the latest document of Venkatarama Chettiar, executed two months prior to his death is valid.

9. The First defendant preferred Appeal before the First Appellate Court challenging the Trial Court judgment. The First Appellate Court reversed the trial court judgment and allowed the appeal by dismissing the suit.

10. The First Appellate Court for reversing the Trial Court finding had marshalled the following reasonings:-

i). The plaintiffs admit the existence of the registered Will (Ex.B-1). The facts which are admitted need not be proved as per Section 58 of the Evidence Act. The cancellation of the said Will subsequently not proved by the plaintiffs.

ii). The first defendant consistently denying the title of the plaintiffs ever since the proceeding before rent control tribunal in R.C.O.P.No.5 of 1982. While so, the plaintiffs have failed prove Ex.A-1 as per Section 123 of the Transfer of Property Act.

iii).The explanation adduced by the plaintiffs for none production of the original settlement deed not believable and failure to examine the attesting witness to the settlement deed is fatal to the case of the plaintiffs. The contradiction between the evidence of P.W-2 and P.W-5 regarding the execution of settlement deed in favour of the plaintiffs and the cancellation of Will on the same day adds to the suspicion about the validity of the settlement deed.

iv). The plaintiffs witness P.W-4, who is the brother of first and second defendant admitted in the cross examination that before and after the death of their father Venkatarama Chettiar, the first defendant was residing in the suit property and the Second defendant used to visit the property occasionally. This contradicts the evidence of P.W-1 regarding the fact averred that between 29/12/1972 (date of settlement deed) and 05/09/1975. The plaintiffs were residing in the suit property continuously and hostile to the plaintiffs for more than the limitation prescribed to claim adverse possession.

11. Therefore, for the above said reasons the First Appellate Court concluded that the settlement deed Ex.A-2 not proved as valid. Even otherwise, it had not come into force. Further, through Ex.B-3 to Ex.B-7 and Ex.B-17, the Tax receipts, the possession with the defendant is proved. Hence, the plaintiffs are not entitled for the relief of declaration or for delivery of possession.



3. Lakhi Baruah and others -vs- Padma Kanta Kalita and others reported in (1996) 8 SCC 357.

4. R.V.E Venkatachala Gounder -vs- Arulmigu Viswesaraswami & V.P.Temples and another reported in (2003) 8 SCC 752.

5. Raja Ram -vs- Jai Prakash Singh and others reported in (2019) 8 SCC 701.

6. Beepathumma and others -vs- Velasari Shankaranarayana Kadambolithaya and others reported in (1964) 5 SCR 836 : AIR 1965 SC 241.

7. Corra Vedachalam Chetty and another Vs.G.Janakiraman reported in 2001(3) CTC 283.

8. Govindabai Chhotabhai Patel and others -vs- Patel Ramanbhai Mathurbhai reported in 2020 (4) LW 655.

15. In response to the appellants submission, the Learned Counsel for the defendant submitted that, the suit is barred under Order II Rule 2 of C.P.C and not maintainable in view of the dismissal of the earlier suit filed for bare injunction against the defendant. The cause of action to seek declaration arose when the title of the plaintiffs denied in the eviction petition before the Rent Control Tribunal and when the earlier suit filed for injunction in the year 1983. In the said suit, the defendant had pleaded in his written statement that the said injunction suit is not sustainable without relief of declaration of title when there is cloud over the title. The present suit filed in the month of September 2000 for declaration and possession is therefore not maintainable.

16. The plaintiffs failed to fulfil the conditions laid under Section 65 of the Indian Evidence Act before secondary evidence could be admitted. Contrarily, the defendant had proved through oral and documentary evidence that he in residing in the suit property since the lifetime of Venkatarama Chettiar and continue to occupy thereafter hostile to the plaintiffs. The tax for the property paid by him and the electricity bills proves his continuous occupation. P.W-1 during the examination, on oath, promised to produce the original settlement deed in the course of the trial, but failed and let in evidence through P.W-3 that the original settlement deed got lost in the Advocate Office at Chennai, which was handed over to him while pursuing the Revision Petition against the R.C.A order. Mere admission of the secondary evidence along with the proof affidavit filed in lieu of chief examination is not proof of the document. The plaintiffs failed to prove the document in the manner prescribed under Section 68 of the Evidence Act. Hence, the Lower Appellate Court judgment has to be confirmed.

17. In support of his submission, the learned counsel for the respondent relied upon the following judgments:-



1. Lakhi Baruah and others -vs- Padma Kanta Kalita and others reported in (1996) 8 SCC 357.

2. J.Yasoda -vs- K.Shoba Rani reported in 2007 (5) SCC 730.

3. C.Kumarasamy -vs- P.Thamayanathi and others reported in 2019 (5) LW 128.

18. Heard the Learned Counsels and perused the records in the light of the judgments cited on either side.

19. The sequence of events as elicited through the documentary and oral evidence flows as under:-

Venkatarama Chettiar, who is the owner of the suit property had earlier executed a Will in favour of his son B.V.Goverthanavasan in the year 1967. He had cancelled it through the subsequent will in favour of his other son B.V.Suryanarayanan (first defendant) on 06/06/1970 and got the Will registered. The certified copy of the said will is Ex.B-1. Later, he has cancelled the Will on 29/12/1972. The factum of cancelling the said will could be seen from Ex.X-1, the register extract maintained at the Sub Registrar Office at Bhavani. On the same day he has also executed the settlement deed in favour of the plaintiffs and got it registered. The certified copy of the settlement deed is marked as Ex.A-2. The recital of the Will Ex.B-1 indicates that the property is bequeathed to the first defendant on the hope that he, at his expense will conduct the marriage of Meenakshi, daughter of Venakarama Chettiar. Later, the Will was revoked stating that the first defendant failed to conduct the marriage as expected and Venakarama Chettiar, at his expense conducted the marriage of his daughter, therefore the will is revoked. On the same day without any reference to the will or its revocation, settlement deed is executed in the name of the plaintiffs and registered.

20. In the year 1982, the attempt by the plaintiffs through their father second defendant to get the first defendant evicted from the suit property did not fructify. Knowing well that the defendant had set up title for himself under a Will of Venkatarama Chettiar, the plaintiffs father had filed a bare injunction suit and let it go for dismissal. The plaintiffs, later restored the suit in the year 1988, only to be dismissed for default again in the year 1997.

21. The suit which is subject matter of this Second Appeal was initially filed before Principal Sub-Court at Bhavani and taken on file as O.S.No.193/2000 on 11/09/2000. Later, it was transferred to the District Munsif Court at Bhavani for want of pecuniary jurisdiction and renumbered as O.S.No.271/2004. When the suit was taken up for trial both the plaintiffs as well as the dependant were not able to produce the original document which they rely upon. Laying a foundation for non-production of



the originals which allegedly lost during the earlier round of litigation, both have gone for trial based on secondary evidence namely the certified copy of the settlement deed marked as Ex.A-2 and the certified copy of the Will marked as Ex.B-1.

22. Before advertng to the citations and the test regarding proof of a document through secondary evidence, the rudimentary difference between a 'settlement' and a 'will' has to be borne in mind to decide the rival claim over the suit property by the two sons of the executants through these documents which divest the ostensible right of the other legal heirs of the executant Venkatarama Chettiar, who had five sons and five daughters.

23. Under a settlement deed, the Transfer of Property is in-praesenti contrary to the will the transfer comes into effect only after the demise of the executant. 'Will' is always revocable. Whereas, settlement is irrevocable. In Ex.A-2 settlement deed it is specifically mentioned that it is irrevocable. On the face of the record, the settlement deed Ex.A-2 which is later in point of time and being an irrevocable transfer, cancels all other testamentary document implicitly, including the Will Ex.B-1. Further, there is evidence to infer Venkatarama Chettiar had cancelled his Will dated 06/06/1970 through a deed of cancellation duly registered at SRO, Bhavani. The entries in the register maintained at SRO office and marked as Ex.X-1 vouchsafe this fact. Under Section 114 of the Evidence Act, the presumption about the entries found in the register has to drawn.

24. Hence, the plaintiffs who claims title over the suit property has to fall or stand on their own legs irrespective of the fact whether the Will Ex.B-1 is proved or not proved by the defendant. Therefore, to declare the settlement deed Ex.A-2 as valid and to confer title to the plaintiffs based on the said settlement deed, the burden of proof lie on the plaintiffs. To prove the settlement, after laying foundation that the original got lost with the Advocate, who was dealing the Rent Control Case, secondary evidence namely the registered certified copy of the settlement deed is marked as Ex.A-2. Law permits secondary evidence on fulfilment of certain conditions. But then, it is not correct to canvas that the presumption under Section 90 of the Evidence Act available for 30 years old document applies to certified copies also. The presumption under section 90 of the Evidence Act is only in respect of original documents/primary evidence. Once a document requires attestation and registered, Section 68 of Evidence Act and its proviso gets attracted. In case, the attesting witness to the document not available or does not support the execution, under Section 71 of the Evidence Act, proof by other evidence is permitted.



25. Admission of a document in evidence and proof of that document are entirely different. In the instant case, Ex.A-2 and Ex.B-1 are secondary evidence, based on the reasons given by the parties for not producing the original document, the Trial Court has admitted both the documents. Though no formal permission granted, the admitting the document and assigning exhibit number, permission to be inferred. If the objection regarding admission of the secondary evidence has to be sustained, then both Ex.A-2 and Ex.B-1 has to be eschewed. Courts are supposed to weight the case based on best evidence available. For the said purpose, the Trial Court has admitted and relied by the trial court without granting any formal permission. There is no error in admitting the secondary evidence when there is no objection at the time of marking. Explicit formal permission to admit secondary evidence is not a mandatory requirement. The first substantial question of law answered accordingly.

26. In the following two judgements, the Hon'ble Supreme Court has said about the test for admitting secondary evidence and manner to prove.

(i). In J.Yashoda -vs- K.Shobha Rani reported in (2007) 5 SCC 730, the Hon'ble Supreme Court has held that,

7. Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.

8. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the Section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence.

9. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to



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enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section.

(ii). In M.Chandra -vs- M.Thangamuthu and another reported in (2010) 9 SCC 712, the Hon'ble Supreme Court has held that,

"It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasized that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party. "

27. The Learned Senior Counsel for the Appellants rely on the observation of the Hon'ble Supreme Court in Irudayammal and others -vs- Salayath Mary reported in 1972 (2) MLJ 508 at paragraph No.5 which reads as below:-

"The first defendant has also satisfactorily accounted for the non-production of the original Will and the non-examination of the attesting witnesses as they are dead and no useful evidence could be given by the scribe. The first defendant



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has, therefore, proved the will by other acceptable, satisfactory evidence supplemented by such presumptions as would arise under the provisions of the Regulations Act and Section 114 of the Evidence Act on the facts of this case. There is a general presumption about the execution of the will arising under Section 60 of the Indian Registration act (vide Mullah's Indian Registration Act Seventh Edition, page 1256). It is true that registration, by itself, in all cases, is not proof of execution, but if no other evidence is available, the certificate of registration is prima facie evidence of its execution and the certificate of the registering officer under Section 60 of the registration Act is relevant for proving execution. (See discussion in Sarkar's Evidence, Latest (12th) Edition, page 640). As observed by the Privy Council in Mohammed Ihtisham Ali vs. Jamna Prasad, AIR 1922 PC 56, registration is a solemn act and if no other evidence is available, the Court can presume that the Registrar performed his duty of satisfying himself that the document presented to him for registration was duly executed by the executant and the executant was duly and properly identified before him. The same view was taken in Gopal Das v. Sri Thakurji, AIR 1943 PC 83, in which, after referring to the earlier decision of the Privy Council in AIR 1922 PC 56 (referred to above) Sir George Rankin observed that the evidence of due registration is itself some evidence of execution as against the other side. There is a full discussion on this question as to the presumption arising from the fact of due registration, coupled with the presumption arising under Section 114 of the Indian Evidence Act, in a Bench decision of the Mysore High Court in Hutchegowda vs. Chennigegowda, AIR 1953 Mys 49, in which it was held that the evidence that a document was duly registered is some evidence of its execution by the person by whom it purports to have been executed. There is a full discussion of the relevant case law including the decision of the privy Council in AIR 1922 PC 56 aforesaid. In Revanna v.



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Dr.A.V.Ranga Rao, AIR 1952 Mys 119, it was observed that in cases where it is impossible for any person to prove execution of a document on account of the death of all the persons concerned the best and the only possible evidence that may be available is that of a certified copy of the registered document and that in such cases a presumption could arise under Section 60 of the Registration Act along with Section 114 of the evidence Act (see also Kashibai vs. Vinayak, It will be seen that in the ultimate analysis, the problem in each case is, 'has the best evidence been adduced on the facts of each case' in the instant case, we have not the slightest hesitation in holding that this essential test for arriving at the truth has been amply satisfied."

28. It is submitted that the plaintiffs have given a plausible explanation for not producing the original settlement deed and Ex.A-2 the certified copy of a registered document is duly proved through witnesses.

29. In C.Kumarasamy -vs- P.Thamayanthi and others reported in 2019 (5) LW 128, this Court after considering catena of judgments has held that,

"From the aforesaid decisions, it is clear that the preconditions for leading secondary evidence are that such original documents could not be produced by the party relying upon such documents inspite of best efforts, unable to produce the same which is beyond their control. It is also clear that the parties sought to be produced secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original document is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot be accepted. It is also clear that it is well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law.



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In this case, as already stated that the first defendant has not established that the original settlement deed has been taken away by the plaintiff or the second defendant from the custody of their mother. Under the said circumstances, the first defendant is not entitled to adduce secondary evidence."

30. The Settlement deed executed out of love and affection is a transfer of immovable property without any monetary consideration falling under the definition of 'Gift'. Section 123 of the Transfer of Property Act, say that for the purpose of making a gift of immoveable property, the transfer must be effected by a registered instruments signed by or on behalf of the donor, and attested by at least two witnesses.

Section 68 of the Evidence Act:-

"Proof of execution of document required by law to be attested:- if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence."

Provided that :- it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied"

31. In this case, the execution is denied not by the executant but by the defendant who is the son of the executant and who claims right in the property through the will purported to have been executed by the executant prior to the settlement. Therefore, the plaintiffs are bound to examine the attesting witness or in the absence of attesting witness any other proof permissible under Section 71 of the Evidence Act.

32. The plaintiffs have examined one Gangadaran as P.W-2 who claims that he was present when Venkatarama Chettiar signed the settlement deed and he accompanied him and others to the Register office. He is neither the scribe nor the attesting witness to the document. He is not able to say any valuable particulars about the attesting witnesses to the document. The register maintained by the Registrar Office summoned and marked



as Ex.X-1. The thumb impression and the signatures found in this register not tested by comparing with admitted thumb impression or signature of Venkatarama Chettiar, through the best evidence available the plaintiffs could have proved the execution of the settlement deed Ex.A-2 but failed to do so. The proviso to Section 68 of the Evidence Act gets attracted if the twin conditions that:-

(i). the document must be compulsorily attested by atleast two witnesses and must not be a Will.

(ii). It must be a duly registered document and not specifically denied by the executant. In the absence of executant or death of the executant any person who could probable derive right in the property are entitled to deny the execution and if such execution is specifically denied then the propounder of the document has to necessarily examine the attesting witness or in alternate prove the execution by other means. The Third substantial question of law is answered accordingly.

33. But then, the plaintiffs failure to prove Ex.A-2 was acted upon and the defendant was only a permissive occupant leads to rejection of the possessory relief. As pointed by the learned counsel for the respondent, in O.S.No.263/1983 filed for injunction, the defendant had denied the plaintiffs title. Immediately, they should have amended the relief or filed fresh suit for declaration of title. It has taken 17 years for them to file the present suit. Though the present suit is neither hit by res judicata nor fall foul of Order II Rule 2 C.P.C, the failure of the plaintiffs to prove the settlement deed Ex.A-2 acted upon and the positive evidence let by the defendant that he had been in continuous possession and enjoyment over the suit property for atleast 25 years hostile to the plaintiffs make the plaintiffs case hopeless.

34. Under Article 65 of the Limitation Act, suit for recovery of possession has to be laid within a period of 12 years from the date when the possession of the defendant becomes adverse to the plaintiffs. The Lower Appellate Court had on facts held in favour of the defendant holding that the documentary evidence beside the deposition of P.W-4 P.V.Dharmaraj, who admit in the cross examination that the Ex.A-2 was prepared at the suit premises and the first defendant was at that time living with his father, proves the claim of the defendant that before and after the demise of his father Venkataramana Chettiar, the first defendant was residing in that house. The said finding of facts does not suffer any perversity or illegality to interfere.

35. Almost similar to the facts of the instant case, recently the Hon'ble Supreme Court in Nazir Mohammed -vs- J.Kamala reported in 2020 (6) CTC 320, has reversed the Madras



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High Court Judgment and allowed the Civil Appeal in which it has observed as below:-

46. A decree of possession does not automatically follow a decree of declaration of title and ownership over property. It is well settled that, where a Plaintiff wants to establish that the Defendant's original possession was permissive, it is for the Plaintiff to prove this allegation and if he fails to do so, it may be presumed that possession was adverse, unless there is evidence to the contrary.

"51. A person claiming a decree of possession has to establish his entitlement to get such possession and also establish that his claim is not barred by the laws of limitation. He must show that he had possession before the alleged trespasser got possession."

"53. A suit for recovery of possession of immovable property is governed by the Limitation Act, 1963. Section 3 of the Limitation Act bars the institution of any suit after expiry of the period of limitation prescribed in the said Act. The Court is obliged to dismiss a suit filed after expiry of the period of limitation, even though the plea of limitation may not have been taken in defence."

"56. As held by the Privy Council in *Peri v. Chrishold* reported in (1907) PC 73, it cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner and if the rightful owner does not come forward and assert his right of possession by law, within the period prescribed by the provisions of the statute of limitation applicable to the case, his right is forever distinguished, and the possessory owner acquires an absolute title."

36. As an epilogue, this Court impelled to quote the legal maxim '*Vigilantibus, Non Dormientibus, Jura Subveniunt*' (The laws assist those who are vigilant, not those who sleep over their rights.)



37. While holding so and dismissing the appeal for the reasons stated above, it is also made clear that as regard to Ex.B-1 Will, without examining the attesting witness or proving by other means permissible under Section 71 of the Evidence Act, Ex.B.1 Will cannot be presumed as proved. The Advocate Commissioner appointed to examine one Sabesan the alleged attesting witness to the Will Ex.B-1, was not able to ascertain the identity of the person and record the deposition from that person. Further, the said Will purported to have been later cancelled by Venkataramana Chettiar as found in Ex.X-1. While so, there is no corollary presumption that failure to prove Ex.A-2 settlement deed is automatically a proof of Ex.B-1 Will. The second substantial question of law is answered accordingly.

38. In the result, the Second Appeal is dismissed. No order as to costs. Consequently, connected Miscellaneous Petitions are closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

bsm

To:-

1. The Sub Court, Bhavani
2. The 1st Additional District Munsif Court, Bhavani.
3. The Section Officer, V.R.Section, High Court, Madras.

+1 CC to M/s. Zeenath Begum, Advocate sr 557163.

+1 CC to Mr.N. Manokaran, Advocate sr 37588.

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CNR(CO)
SP(16/08/2021)