



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 13.09.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD) No.118 of 2008 and

M.P. (MD) Nos.1 of 2009 & 1 of 2011 &

C.M.P. (MD) No.8252 of 2019

1. Kukiliya (Died) ... Appellant / Appellant /
1st Defendant

2. L.Vasanthakumari

3. K.Monikumar

4. K.Subramoniam

(Appellants 2 to 4 are brought on record as LR's. of the
deceased sole appellant vide Order dated 26.08.2021
made in C.M.P. (MD) No.6207 of 2021)

...Appellants 2 to 4.

Vs.

1. Rani @ Azhakammai ... 1st Respondent/1st Respondent/
Plaintiff

2. Rajeswari (Died)

3. Palachi

... Respondents 2 & 3/Respondents 2 & 3/
Defendants 2 & 3

4. Rajarathinam

5. Nagarajan

6. Shankar

7. Meena

8. Kannan

9. Soundarrajan

10.Gopi

(Respondents 4 to 10 are brought on record as LR's. of the
deceased 2nd Respondent vide order dated 26.08.2021
made in M.P. (MD) No.1 of 2012)

... Respondents 4 to 10

Prayer: Second appeal filed under Section 100 of C.P.C.,
against the Judgment and Decree passed in A.S.No.55 of 2005 on the
file of the District Court, Kanyakumari at Nagercoil, dated
20.03.2007 confirming the Judgment and Decree passed in O.S.No.27 of
2004 on the file of the I Additional Sub Court, Kanyakumari at
Nagercoil, dated 08.04.2005.

For Appellant

: Mr.M.P.Senthil

For R-1

: Mr.K.P.Narayanakumar

For R-5, R-6 &



R-8 to R-10 : Ms.A.Amala
For R-3 : No appearance.
For R2 : Dismissed
For R4 : No Such Person
For R7 : Service Awaited

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J U D G M E N T

The first defendant in O.S.No.27 of 2004 on the file of the I Additional Sub Court, Nagercoil, filed this second appeal.

2. During the pendency of the second appeal, the first defendant passed away and his legal heirs have come on record. The first respondent herein, namely, Rani @ Azhakammai filed the said suit seeking partition and separate possession of 1/4th share in the plaint schedule property by metes and bounds. She also wanted the decree made in O.S.No.382 of 1982 on the file of the District Munsif, Nagercoil, to be set aside and the settlement deed dated 04.12.1974 executed in favour of the first appellant to be set aside.

3. The case of the first respondent/plaintiff was that the suit property belonged to her father Sankarachinthamani. Sankarachinthamani was a much married man. The mother of the parties herein, namely, Ponnammal was his fifth wife. Sankarachinthamani passed away in the year 1957. Ponnammal passed away on 05.04.1981. According to the plaintiff, Ponnammal died intestate. During her lifetime, she is said to have executed a settlement deed dated 04.12.1974 (Ex.A.2 = Ex.B.1) in favour of the appellant Kukiliya. The specific case of the plaintiff was that in the suit property which measures 7 cents and 134 sq.ft., Ponnammal had undivided share of 2 cents and 308 sq.ft. She could not have therefore settled the entire suit property in favour of Kukiliya. On that ground, the plaintiff wanted to invalidate the said settlement deed dated 04.12.1974. Since on the strength of the said settlement deed, Kukiliya had obtained recovery of possession in respect of the suit property against his sister Palachi by filing O.S.No.382 of 1982, the plaintiff wanted to have the decree also to be set aside. The third defendant Palachi remained ex-parte. The second respondent sailed with the plaintiff. Kukiliya alone resisted the suit. Based on the rival pleadings, the trial Court framed the necessary issues. The plaintiff/first respondent herein examined herself as P.W.1 and marked Ex.A.1 to Ex.A.5. The first defendant Kukiliya examined himself as D.W.1 and marked Ex.B.1 to Ex.B.45. After a consideration of the evidence on record, the trial Court by judgment and decree dated 08.04.2005 passed preliminary decree allotting 1/4th share in favour of the plaintiff. It was silent on the other reliefs sought by the plaintiff. Aggrieved by the same, the first defendant filed A.S.No.55 of 2005 before the District Court, Kanyakumari. By judgment and decree dated 20.03.2007, the first appellate Court



confirmed the decision of the trial Court and dismissed the appeal. Challenging the same, this second appeal came to be filed.

4. This second appeal was admitted on the following substantial questions of law:-

"i) Whether the finding of the Court below that the settlement deed under Ex.A.2 dated 04.12.1974 is not binding on the first respondent and that the same has not been acted upon is erroneous, in view of the fact that the suit was filed after 30 years, and barred by limitation?

ii) Whether the Courts below are right in not considering the specific findings with reference to Ex.A.2 in the prior proceedings under Exs.B.20 to B.22 by merely stating that the first respondent is not a party to the proceedings without adverting to the scope and purport of Section 13 of the Indian Evidence Act?"

5. As already pointed out that during the pendency of the appeal the appellant/first defendant as well as the second respondent/second defendant passed away and their legal heirs have been brought on record.

6. Heard the learned counsel on either side.

7. There is no dispute that the suit property belonged to Sankarachinthamani, father of the parties to the suit. There is again no dispute that Sankarachinthamani had executed a settlement deed in favour of his wife Ponnammal, the mother of the parties to the suit vide Ex.A.1 settling 2 cents and 308 sq.ft. of land in the suit property. Sankarachinthamani had passed away in the year 1957. While so, Ponnammal executed a settlement deed dated 04.12.1974 settling the entire suit schedule property in favour of her son, appellant herein Kukiliya. During the relevant time, Kukiliya was carrying on business in Kerala and the suit property was in possession of the other sister, namely, Palachi. On the strength of the settlement deed, Kukiliya filed O.S.No.382 of 1982 on the file of the District Munsif Court, Nagercoil for recovery of possession. The suit was decreed. The appeal filed by the third defendant herein was dismissed. Challenging the same, she filed S.A.No.1507 of 2003 before the High Court. The High Court by judgment and decree dated 23.04.2004 dismissed the second appeal. In the said proceedings, the settlement deed dated 04.12.1974 was upheld. The third defendant Palachi was directed to hand over possession to Kukiliya. When on the strength of the said judgment and decree, Kukiliya filed execution petition, the present partition suit was instituted. According to the learned counsel for the appellants, Ponnammal had executed settlement deeds not only in favour of the son but also in favour of the daughters. For instance, under Ex.B.2 dated 10.12.1962 Ponnammal had settled a property in favour of the plaintiff Rani @



Azhakammai and her husband Krishnan. According to the appellant's counsel, the Courts below ought to have dismissed the present partition suit *in toto*.

8. I sustain the contention that while Ponnammal could not have settled the entire suit property in favour of Kukiliya vide Ex.B.1 dated 04.12.1974, the said settlement deed was definitely valid to the extent of 2 cents and 308 sq.ft. of land settled in her favour under Ex.A.1 executed by her husband Sankarachinthamani Plus her 1/5th share in the remaining extent of the suit property. In other words, Ex.B.1 would be valid and enforceable to that extent. Though the plaintiff had specifically sought the relief of setting aside the said settlement deed Ex.B.1, the judgments and decrees passed by the Courts below are silent on that score. As per Explanation V of Section 11 of Civil Procedure Code, any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of that section, be deemed to have been refused. Extending the same principle, I can safely conclude that the relief to set aside Ex.B.1 has been negatived by the Courts below. The contesting parties have not filed any cross appeal or cross objection either before the first appellate Court or before me.

9. It is seen that the trial Court did not go into the validity of the judgment and decree made in O.S.No.382 of 1982 on the file of the Additional District Munsif, Nagercoil. Even though the said judgment and decree was confirmed by this Court in S.A.No.1507 of 2003, the Court below definitely had the jurisdiction to adjudicate the said question. I fail to understand as to why the trial Court disposed of the suit as if no such relief was sought. I cannot appreciate such an approach. A member of the bar loudly whispered that whenever such a relief is sought, the trial Courts decline to go into it.

10. I have no hesitation to render a finding that the judgment and decree made in O.S.No.382 of 1982 and confirmed in S.A.No.1507 of 2003 will not bind the plaintiff. In the said suit, Kukiliya sought relief only against the third defendant Pallachi. Neither the plaintiff nor the second defendant were made parties in the said proceedings. Therefore, it would not bind them. Since the third defendant is bound by the said judgment, she would not be entitled to any further share in the suit property. The substantial questions of law are answered accordingly. The first respondent herein/plaintiff Rani @ Azhakammai will be entitled to 400.8 sq.ft. of land in the suit schedule property. The legal heirs of the first appellant will be entitled to 2381.1 sq.ft. of land in the suit schedule property. The legal heirs of the second defendant will be entitled to 400.8 sq.ft. of land in the suit schedule property. The third defendant will not be entitled to any share in the suit property.



11. The second appeal is partly allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (Cs-I)

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// True Copy //

/ /2022

Sub Assistant Registrar(CS)

PMU

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The District Judge,
Kanyakumari at Nagercoil.
2. The I Additional Sub Judge,
Kanyakumari at Nagercoil.
3. The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.A.AMALA, Advocate (SR-28901[F] dated 13/09/2021)

+1 CC to M/s.K.P.NARAYANA KUMAR, Advocate (SR-29056[F] dated 15/09/2021)

S.A. (MD) No.118 of 2008
13.09.2021

MA (CO)
KB(22.03.2022) 5P 7C