



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATE: 14.12.2021

CORAM

THE HON'BLE MRS.JUSTICE V. BHAVANI SUBBAROYAN

SA(MD)No.240 of 2021 &

CMP(MD)No.3364 of 2021

WEB COPY

S.Kamal

... Appellant/Appellant/Plaintiff
vs.

K.Amutha

...Respondent/Respondent/Defendant

Prayer: Second Appeal filed under Section 100 of CPC against the Judgment and decree in AS.No.31/2019 dated 24.11.2020 on the file of the Principal Subordinate Court, Srivilliputtur confirming the Judgment and decree in OS.No.206/2011 dated 27.02.2019 on the file of the Principal District Munsif and Judicial Magistrate Court No.I, Srivilliputhur.

For Appellant : Mr.M.Jothi Basu

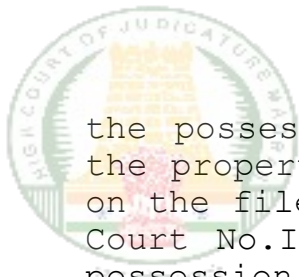
J U D G M E N T

This Second Appeal is filed against the Judgment and decree in AS.No.31/2019 dated 24.11.2020 on the file of the Principal Subordinate Court, Srivilliputhur confirming the Judgment and decree in OS.No.206/2011 dated 27.02.2019 on the file of the Principal District Munsif and Judicial Magistrate Court No.I, Srivilliputhur.

2. The appellant / plaintiff has instituted a suit in O.S.No.206/2011 on the file of the Principal District Munsif and Judicial Magistrate Court No.I, Srivilliputhur, praying for declaration and recovery of possession.

3. The case of the parties before the trial Court is as under:-

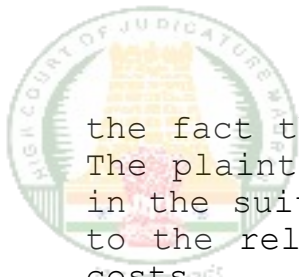
(i) The plaintiff's paternal grandmother one Amirtha Eswari is the owner of the suit schedule property and she had been in possession and enjoyment of the suit schedule property without any disturbance. On 04.07.2006, she had executed a registered settlement deed in favour of the plaintiff. Thereafter, the plaintiff was in possession and enjoyment of the suit schedule property from the date of execution of settlement deed. While that being so, in the year 2009, the plaintiff's father's sister namely, Amutha, the defendant in the suit, sought for permission to stay in the suit schedule property. The plaintiff also orally allowed his aunt to stay in the house situated in the suit schedule property as an occupant. On 11.02.2010, the plaintiff's paternal grandmother, Amirtha Eswari died. Since the plaintiff wanted to occupy the suit schedule property, on 01.06.2011, he requested the defendant to hand over the possession to him. The defendant, instead of handing over



the possession, denied the right of the plaintiff as the owner of the property. Hence, the plaintiff filed a suit in O.S.No.206/2011 on the file of the Principal District Munsif and Judicial Magistrate Court No.I, Srivilliputhur praying for declaration and recovery of possession.

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(ii) In the suit, the defendant filed a written statement denying all the averments except those are specifically admitted. The defendant is the sister of plaintiff's father. The paternal grandmother of the plaintiff, Amirtha Eswari, died on 11.02.2010. The suit schedule property belongs to one Mariachinnammal by way of settlement order passed by the Special Tasildhar, Srivilliputhur in the year 1979. The husband of Mariachinnammal, namely, Michael, who was working in Indian Army, died at Pune in a war 45 years ago. The plaintiff's father namely Sekar and the defendant were the only legal heirs of Mariachinnammal and Michael. Since Michael died, Mariachinnammal was taken care by her father Chinnappan. In the year 1980, the defendant constructed a house bearing Door No.65C in the suit schedule property by using her hard earned money. The defendant and her mother Mariachinnammal were residing in the said house and Voter Identity Card was also issued to them. Since the defendant's father died during his Service period, the defendant's mother had been receiving pension. In the documents namely Voter Identity Card and Pension Book, the name of the defendant's mother was mentioned as Mariachinnammal. Mariachinnammal died on 11.10.2010, leaving the defendant alone as a legal heir *intestate*. After the death of Mariachinnammal, the defendant alone is in possession and enjoyment of the suit schedule property. Ten years ago, the defendant had constructed 3 houses with asbestos sheet and rented out the same. On 12.03.1994, the Special Tahsildhar, Rajapalayam issued patta in the name of the defendant's mother under the Natham Land Tax Scheme. In the said patta, the name of the defendant's mother has been wrongly mentioned as Mariya Michael's wife Amutha Eswari and based on the said document, the plaintiff had created a forged document ie., the alleged registered settlement deed dated 04.07.2006. All the facts in the settlement deed are false, except that the photo of the defendant's mother is affixed on it. The defendant's mother Mariachinnammal knows to put her signature. In the complaint lodged by Mariachinnammal on 30.07.2005 before the Rajapalayam North Police Station, regarding the missing of her Pension Book, she had put her signature. However, in the settlement deed dated 04.07.2006, only the thumb impression of Mariachinnammal finds place. This fact would clearly show that the settlement deed is a forged document created by the plaintiff. Even though, the plaintiff has changed the electricity connection in his name by using settlement deed, only the defendant is paying electricity bill. On 13.04.2005, the defendant rented out the house bearing Door No.65C to one Mary. Similarly, two other houses were occupied by some other persons. The defendant is staying in another house in the suit schedule property. The plaintiff has suppressed



the fact that there are other houses in the suit schedule property. The plaintiff has filed the suit as if only one house is available in the suit schedule property. Hence, the plaintiff is not entitled to the relief sought for and prayed for dismissal of the suit with costs.

4. Before the trial Court, on the side of the plaintiff, the plaintiff was examined as PW1 and Exs.P1 to P10 were marked. On the side of the defendants, DW1 to DW3 were examined, wherein, the defendant was examined as DW1 and Exs.D1 to D29 were marked. On the Witness Side, Ex.W1 was marked.

5. On the basis of rival pleadings, the Trial Court had framed the following issues for consideration:-

- "(i) Whether the suit schedule property absolutely belongs to the plaintiff?
- (ii) Whether the plaintiff is entitled for the declaration relief as prayed for in the plaint?
- (iii) Whether the plaintiff is entitled for recovery of possession from the defendant?
- (iv) To what other reliefs, the plaintiff is entitled to?"

6. The learned Principal District Munsif and Judicial Magistrate No.I, Srivilliputhur, after hearing both sides and perusing the materials available on record, dismissed the suit with costs on the grounds that (i) the plaintiff has failed to prove the registered settlement deed dated 04.07.2006 marked as Ex.A2 and (ii) the fact that the defendant is staying in the suit schedule property only based on the oral permission granted by the plaintiff is false.

7. Aggrieved by the Judgment and decree passed by the trial Court, the plaintiff filed an appeal in AS.No.31/2019 before the Principal Subordinate Court, Srivilliputhur. The Appellate Court after hearing both sides and upon reappraising the evidences available on record, has dismissed the appeal and confirmed the Judgment and decree passed by the trial Court.

8. Challenging the concurrent Judgments and decrees passed by the Courts below, the present second appeal has been filed raising the following substantial questions of law:-

"(a) Whether the Courts below are correct in deciding the validity of Ex.A2, registered settlement deed, executed by the original owner of the property in favour of the plaintiff, in which, the plaintiff has changed the property tax and electricity bill in his name after its execution?

(b) Whether the Courts below are correct in applying the principles of Section 68 of Indian



Evidence Act, 1872 in which the executor of the document Ex.A2 was no more and she has not denied the execution of the document?

(c) Whether the Courts below are correct in finding fault with the plaintiff, when he filed a suit for declaration and recovery of possession within the period of limitation?"

9. Heard the learned counsel appearing for the appellant / plaintiff and perused the materials available on record.

10. The learned counsel for the appellant / plaintiff would submit that the appellant / plaintiff's grandmother is the original owner of the suit schedule property and the respondent / defendant is none other than the sister of the plaintiff's father ie., plaintiff's aunt. The appellant / plaintiff's grandmother, who is also the respondent / defendant's mother, executed a registered settlement deed on 04.07.2006 in favour of the appellant / plaintiff. Since in the year 2009, the respondent / defendant approached the appellant / plaintiff seeking permission to stay in the suit schedule property, he granted permission to the respondent / defendant to stay in the property. The settlement deed dated 04.07.2006, marked as Ex.A2 is a registered document and on the basis of the same, the appellant / plaintiff has changed the property tax and electricity bill of the house in his name. While so, on the basis of Ex.A2, the Courts below ought to have granted the relief sought for by the appellant / plaintiff. The appellant / plaintiff has adduced the Certificate issued by VAO dated 04.08.2009 to prove the fact that Amutha Eswari and Mariachinnamal are one and the same person. In fact, the trial Court has not accepted the claim of the respondent / defendant that the names Amutha Eswari and Amirtha Eswari found in the documents do not point out the name of the mother of the respondent / defendant. The Courts below ought to have considered the fact that the respondent / defendant admitted the photo that was affixed in the registered settlement deed dated 04.07.2006 as her mother's photo. The registered settlement deed dated 04.07.2006, Ex.A2 was executed by the defendant's mother in favour of the plaintiff. When the executor of the document does not deny the execution, there is no need to examine the attester to prove its validity. The learned counsel would therefore contend that the appellant / plaintiff has adduced sufficient evidence to prove the fact that he is the owner of the suit schedule property and prayed for allowing this appeal.

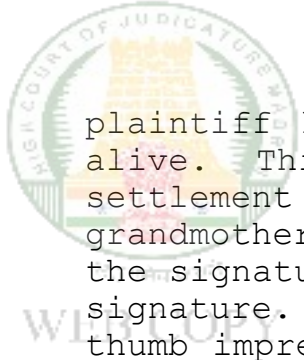
11. Admittedly, the appellant / plaintiff's grandmother, who is the respondent / defendant's mother, is the original owner of the suit schedule property. The appellant / plaintiff filed the suit for declaration and recovery of possession, which would clearly show that the appellant / plaintiff was not in possession of the suit



schedule property, at the time of institution of suit. The appellant / plaintiff claims right over the suit schedule property through a registered settlement deed dated 04.07.2006, which is said to be executed by the appellant / plaintiff's grandmother. He claims that he was in possession and enjoyment of the property after the demise of his grandmother. The respondent / defendant approached him in the year 2009 seeking permission to stay in the suit schedule property. He had also granted permission orally. However, a perusal of Ex.P8 would show that the appellant / plaintiff had given a representation on 30.07.2008 for transfer of patta in his name before the Tahsildhar, Rajapalayam and the respondent / defendant had given an objection to the appellant / plaintiff's representation on 21.08.2008. On 17.11.2008, the Tahsildhar, Rajapalayam has passed an order to the effect that since it is not known as to whether Mariachinnammal and Amirtha Eswari are one and the same person or not, and since, the respondent / defendant had also objected the representation made by the appellant / plaintiff, the appellant / plaintiff is advised to approach the Civil Court for appropriate remedy. The above facts would clearly show that the dispute regarding the suit schedule property arose in the year 2008. When the dispute arose as early as in the year 2008, the appellant / plaintiff has not chosen to produce his grandmother before the Revenue Authorities, to prove the fact that his grandmother executed a settlement deed dated 04.07.2006 in favour of him. He waited for nearly two and half years to file the suit, more particularly, he filed the suit only after the demise of his grandmother. Thus, when the appellant / plaintiff had sufficient opportunity to prove the fact that the registered settlement deed dated 04.07.2006 was executed by his grandmother, by examining his grandmother when she was very well alive, he failed to do so. Further, he has not chosen to examine any of the officials who had signed the registered settlement deed dated 04.07.2006. In this context, it is necessary to extract the Section 68 of the Evidence Act, 1872, which reads as follows.

"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"

According to the Section 68 of the Evidence Act, atleast one attesting witness has to be examined for a document to used as an evidence, if a document is required by law to be attested. In the present case, the respondent / defendant has objected the registered settlement deed dated 04.07.2006. While so, the burden lies on the appellant / plaintiff to prove the document and the appellant /



plaintiff has not chosen to examine his grandmother when she was alive. This gives raise to a strong suspicion as to whether Ex.A2, settlement deed was executed by the appellant / plaintiff's grandmother or not. Further, the respondent / defendant objected the signature that was found in Ex.A2, since her mother knows to put signature. The appellant / plaintiff was also not able to prove the thumb impression of his grandmother. Mere affixture of the photo of the appellant / plaintiff's grandmother in Ex.A2, is not a proof that Ex.A2 document was executed by the appellant / plaintiff's grandmother. In such facts and circumstances, this Court concurs with the decision of the lower Courts that the registered settlement deed dated 04.07.2006, by which the appellant / plaintiff claims right over the suit schedule property, has not been proved by the appellant / plaintiff.

12. According to the appellant / plaintiff only in the year 2009, the respondent / defendant approached him and requested for permission to stay in the suit schedule property and he also allowed her to stay in the property. However, a perusal of Ex.D2, Voter's Survey list shows that the respondent / defendant and her husband were residing in the suit schedule property during the year 1999. Further, in the Ration Card issued for the years 2005-2009, marked as Ex.D10, the address of the respondent / defendant is found to be the address of the suit schedule property. Ex.D11, Voter Identity Card also shows that the respondent / defendant was residing in the suit schedule property. The documents produced by the respondent / defendant would also reveal that she has been paying kist for the suit schedule property. Hence, from all these documents, it can be concluded that the respondent / defendant was in possession and enjoyment of the suit schedule property even before the institution of the suit and this conclusion nullifies the case of the appellant / plaintiff that (i) the respondent / defendant had approached him only in the year 2009 seeking permission to stay in the suit schedule property, (ii) he allowed the respondent / defendant to stay in the suit schedule property and also the fact that (iii) he has filed the suit in OS.No.206/2011 only because the respondent / defendant failed to hand over the possession to him.

13. After elaborate consideration of the oral and documentary evidences adduced on both sides, both the Courts concurrently held that both the parties were not in a position to prove whether Amirtha Eswari, Amutha Eswari and Mariachinnammal are all one and the same person or not. Even though the lower Courts have elaborately dealt with the above issue, the Courts below have also observed that since both parties have admitted that the suit schedule property belong to the appellant / plaintiff's grandmother who is also the respondent / defendant's mother, the significant issue to be decided in the case is as to whether, the registered settlement deed dated 04.07.2006 was executed by the appellant / plaintiff's grandmother or not. As mentioned above, the appellant /



plaintiff has failed to prove beyond doubt that the registered settlement deed dated 04.07.2006 was executed by his grandmother. There is sufficient proof adduced by the respondent / defendant for the fact that she has been in possession and enjoyment of the suit property even prior to the institution of suit. Hence, the appellant / plaintiff failed to prove that he has better title than the respondent / defendant.

14. For the reasons stated above, this Court finds no reason to interfere with the well reasoned Judgments of the Courts below and therefore, no substantial question of law arises for consideration in this appeal. Accordingly, the Second Appeal is hereby dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (AD-II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

Mbi

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 Principal Subordinate Judge,
Srivilliputtur
2. The Principal District Munsif
and Judicial Magistrate No.I,
Srivilliputhur
3. The Record Keeper, (2C)
VR Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.G.M.LAW OFFICE, (Mr.MJothi Basu) Advocate (SR-38882[F]
dated 15/12/2021)

SA(MD)No.240 of 2021
14.12.2021

SRK(CO)

KB(19.01.2022) 7P 6C

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