



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 11.04.2022

CORAM:

THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD) No.75 of 2010

Thangavel .. Appellant/Respondent/Plaintiff

-vs-

1.Thangarasu (died) .. Respondent/1st Appellant/
1st Defendant

2.Kumar

3.Tamil Nadu Government,
its District Collector,
District Collector Officer,
Pudukkottai District,
Pudukkottai.

4.The Tahsildar,
Taluk Office,
Aranthangi Taluk,
Aranthangi,
Pudukkottai District. ... Respondents 2 to 4/Respondents 2 to 4/
Defendants 2 to 4

5.Sengamalam

6.Elango

7.Nethaji ... Respondents

(Respondents 5 to 7 are brought on
record as LRs of deceased R1
by Court order dated 22.04.2019)

Prayer :- Second Appeal filed under Section 100 of Civil Procedure Code to set aside the decree and judgment dated 17.06.2009, in A.S.No.133 of 2008 on the file of the learned Subordinate Judge, Pudukkottai, reversing the judgment in O.S.No.74 of 2003, dated 13.03.2008, on the file of the District Munsif Court, Aranthangi and decree the same by allowing this Appeal.



For Appellant : Mr.K.Baalasundaram

For R2 : Mr.R.Paranjothi

For R3 and R4 : Mr.R.Ragavendran

For R7 : Mr.V.Murugan

For R5 and R6 : No appearance

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JUDGMENT

The plaintiff in O.S.No.74 of 2003 on the file of the District Munsif Court, Aranthangi, is the appellant in this Second Appeal. The suit was filed for the relief of declaration and permanent injunction and mandatory injunction.

2.The case of the plaintiff is that the suit items originally belonged to one Muthusamy. After the demise of Muthusamy it devolved on his wife Silambayi Ammal. Silambayi Ammal settled the suit items in favour of the plaintiff vide deed dated 20.12.1967 (Ex.A2). The plaintiff has been in possession and enjoyment of the suit items ever since. Patta was also issued in favour of the plaintiff. While so, the defendants 1 and 2, without any manner of right or title, have attempted to interfere with the plaintiff's possession and enjoyment of the suit properties. The plaintiff also came to know that there has been a sub division of the survey numbers and suit item No.1 comprised in S.No.200-20A is now standing in the name of the first defendant while, the property comprised in S.No.200-21B is standing in the name of the second defendant. The plaintiff wanted the revenue authorities shown as Defendant Nos.3 and 4 to effect appropriate changes in the revenue records also. The suit was filed in the aforesaid relief of declaration, permanent injunction and mandatory injunction.

3.The first defendant filed written statement controverting the plaint averments. While admitting that the suit property originally belonged to Muthusamy and that it devolved on Silambayi Ammal and that Silambayi Ammal executed settlement deed dated 20.12.1967 in favour of the plaintiff, the first defendant would plead that Ex.B3 dated 23.10.1971 was executed by Silambayi Ammal and the plaintiffs in favour of the first and second defendants. The first defendant would point out that the second defendant is none other than the son of the plaintiff. According to him, Ex.B3 had come into force also. The first defendant would allege that the plaintiff had filed the suit by suppressing material facts.

4. After the first respondent filed written statement, the plaintiff filed replication denying the execution of the settlement deed dated 23.10.1971. According to him, the said document is fraudulent. Based on the divergent pleadings, the trial Court



framed four issues. Unfortunately, it did not frame any issue regarding the genuineness/ validity of Ex.B3 dated 23.10.1971.

5.The plaintiff examined himself as P.W.1, and one Periyasamy as P.W.2. Exhibits A1 to A11 were marked. The first defendant examined himself as D.W.1. One Lakshmanan said to be an attester of Ex.B3 was examined as D.W.2. Exhibits B1 to B3 were marked. After consideration of the evidence on record, the trial Court on 13.03.2008 decreed the suit as prayed for.

6.Aggrieved by the same, the first defendant filed A.S.No.133 of 2008 before the Subordinate Court, Pudukkottai. By the impugned judgment and decree dated 17.06.2009, the decision of the trial Court was reversed and the appeal was allowed and the suit came to be dismissed. Challenging the same, this Second Appeal was filed by the plaintiff.

7.This Second Appeal was admitted on 12.02.2010 on the following substantial questions of law.

"a)Whether the registration of Gift deed dispense with the proof of that document stipulated under Section 68 of Indian Evidence Act?

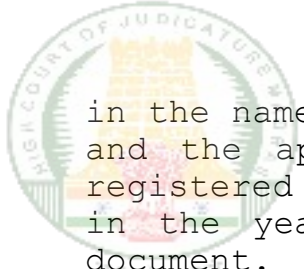
b)When a fact is admitted in written statement whether such fact is to be proved by appointment of Commissioner within the meaning of Section 58 of Indian Evidence Act."

8.Heard the learned counsel appearing for the appellant who reiterated the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial questions of law in favour of the appellant and set aside the impugned judgment and decree and restore the decision of the trial Court.

9.Per contra, the learned counsel for the respondent submitted that the impugned judgment and decree did not call for any interference. The learned counsel for the contesting respondent filed notes of arguments also. According to him, the conduct of the plaintiff was not good and that is why, Silambayi Ammal who executed the settlement deed dated 20.12.1967(Ex.A2), executed a fresh settlement deed dated 23.10.1971(Ex.B3), in which she settled the property in favour of the son of the plaintiff and the first defendant. He would further argue that Ex.A3 had come into force.

10.During the pendency of the appeal, the first defendant passed away and the legal representatives have come on record.

11. The learned Government Advocate as well as the learned counsel appearing for the legal representatives of the first defendant submitted that the revenue records are presently standing



in the name of the first defendant in respect of the suit first item and the appellant has also suppressed the fact that Ex.B3 is a registered document. It was submitted that the suit was filed only in the year 2003. Ex.A3 qualified to be treated as an ancient document. Presumption under Section 90 of the Evidence Act and under Section 60 of the Registration Act, stood attracted. The submission is that relying on these twin presumptions, the first appellate Court had rightly reversed the judgment and decree of the trial Court.

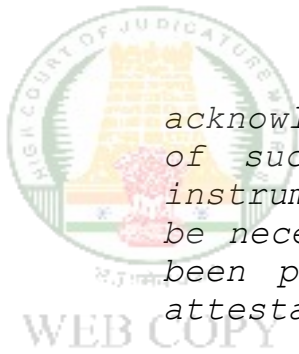
12.I carefully considered the rival submissions and went through the evidence on record. I must remark that the trial Court erred in not framing an issue regarding the genuineness of Ex.B3.

13.The case of the plaintiff is based entirely on a settlement deed dated 20.12.1967. The execution of Ex.A2 is admitted. The case of the plaintiff is sought to be negatived only by relying on Ex.B3 dated 23.10.1971. The defence of the first defendant had to stand or fall on this document dated 23.10.1971. The plaintiff had filed replication questioning its genuineness. He called it a fraudulent document. Therefore, the burden of proof lay only on the first defendant to prove Ex.B3.

14.It is true that it qualifies to an ancient document within the meaning of Section 90 of the Evidence Act. But then, the presumption under Section 90 of the Evidence Act is extendable only to the signatures appearing in the said document and nothing more. Likewise, Section 60 of the Registration Act, presumes that the formalities of registration stood complied with. Ex.B3 is a gift deed. As per Section 122 and 123 of the Transfer of Properties Act, 1882, it requires to be attested by atleast two witnesses. Since the genuineness of Ex.B3 has been challenged, the first defendant was obliged to prove the same as contemplated under Section 68 of the Indian Evidence Act, 1872. He ought to have called atleast one attesting witness to prove the due execution of Ex.B3. No doubt, the first defendant had called D.W.2, Lakshmanan said to be the attester of the documents.

15.I went through the deposition of D.W.2, Lakshmanan. He only states that the plaintiff and his aunt executed a settlement deed in favour of the first and second defendants and that he signed as a witness. He does not state anything more than that. The expression 'attested' has been defined in the interpretation clause in the Transfer of Property Act, 1882 as follows:

" "attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has been some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal



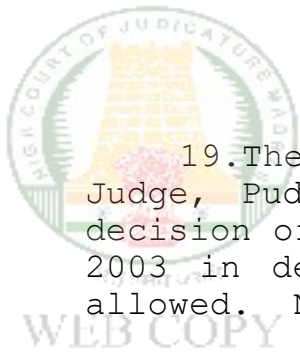
acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary;"

16.This expression has been dealt with in a catena of decisions. The Hon'ble Full Bench of the Madras High Court in a decision reported in **[1962 (1) MLJ 78]** in the case of **H.Venkata Sastri and sons by its Manager H.Venkata Sastri (Died) and others Vs Rahilna Bi and others**, held as follows:

"Thus of the two significant requirements of the term "attest", namely, (1) that the attesor should witness the execution, which implies his presence, then, and (2) that he should certify or vouch for the execution, by subscribing his name as a witness, which implies a consciousness and an intention to attest, the Amending Act modified only the first: the result is that a person can be an attesting witness, even if he had not witnessed the actual execution, by merely receiving personal acknowledgment from the executant of having executed the document and putting his signature. But the amendment did not affect in any way the necessity for the later requirement namely, certifying execution which implies that the attesting witness had the animus to attest."

17.In the case on hand, the testimony of D.W.2 Lakshmanan, does not fulfil the said statutory requirements. Lakshmanan has not deposed that he saw Silambayi Ammal and Thangavel execute the instrument or received an acknowledgement from them that they executed the instrument. The irresistible conclusion is that Ex.B3 has not been proved in the manner known to law. When Silambayi herself executed Ex.A2 dated 20.12.1967, she could not have once again executed another settlement deed dated Ex.B3, covering the very same properties. Silambayi was incompetent to be one of the executants of Ex.B3. The defendants have also failed to prove that it was the plaintiff who executed Ex.B3 along with Silambayi.

18.There is yet another aspect of the matter. To prove possession over the suit property, the first defendant has marked Ex.B1 and Ex.B2. Ex.B1 is a mere communication. Ex.B2 is, ofcourse, a revenue patta standing in the name of the first defendant in respect of Item No.1. But then, it came into existence in the year 2006, i.e., during the pendency of the suit and it deserves to be ignored. The first Appellate Court failed to take note of Section 68 of the Evidence Act. I answer the first substantial question of law in favour of the appellant. It is not necessary to go into the second substantial question of law.



19.The impugned judgement and decree of the learned Subordinate Judge, Pudukkottai, in A.S.No.133 of 2008 is set aside and the decision of the learned District Munsif, Aranthangi, in O.S.No.74 of 2003 in decreeing the suit is restored and the Second Appeal is allowed. No costs.

Sd/-

Assistant Registrar(CS-III)

// True Copy //

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Sub Assistant Registrar(CS)

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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 Subordinate Judge, Pudukkottai.

2.The District Munsif Court, Aranthangi.

Copy to

The Section Officer,V.R.Section,

Madurai Bench of Madras High Court, Madurai.(2 copies)

+1 CC to M/s.V. MURUGAN, Advocate (SR-17871[F] dated 11/04/2022)

+1 CC to M/s.SPL.GP. (SR-18390[F] dated 12/04/2022)

S.A.(MD) No.75 of 2010

11.04.2022

sp(CO)

TR(10.06.2022) 6P 7C