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SA(MD)No.64 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 26/07/2024

CORAM

The Hon'ble Mr.Justice **G.ILANGOVAN**

SA(MD)No.64 of 2021
and
CMP(MD)No.811 of 2021

1.Murugan
2.Lakshmanan : Appellants/Appellants/
Plaintiffs

Vs.

1.Saraswathi
2.Muppulimadan @ Kannan
3.Pannerselvam @ Pappa : Respondents/Defendants

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, to set aside the judgment and decree, dated 02/11/2020 passed in AS No.15 of 2018 on the file of the Additional Sub Court, Tenkasi, confirming the judgment and decree, dated 30/11/2017 passed in OS No.455 of 2011 on the file of the Additional District Munsif Court, Tenkasi.

For Appellants : Mr.V.Meenakshisundaram
for Mr.D.Nallathambi

For Respondents : Mr.N.Vignesh



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J U D G M E N T

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This second appeal is filed against the judgment and decree, dated 02/11/2020 passed in AS No.15 of 2010 by the Additional Sub Court, Tenkasi, confirming the judgment and decree, dated 30/11/2017 passed in OS No.455 of 2011 by the Additional District Munsif Court, Tenkasi.

2.The facts in brief:-

The suit property originally belongs to the plaintiffs' father by name Kasi Nadar and the first defendant. Kasi Nadar died in 2001 leaving the plaintiffs and the second defendant as his legal heirs. The second schedule devolved upon the plaintiffs and the defendants jointly. In the month of Thai' 2009, the second schedule was divided between them orally, by which, the first schedule was allotted to the plaintiffs and their mother namely the 1st defendant. Right from the oral partition, the suit first schedule property is in enjoyment of the plaintiffs and the second defendant jointly.

3.In 2009 Panguni month, again there was a division between the plaintiffs and the second defendant, by which the suit first schedule was allotted to the second defendant. She executed a settlement deed in respect of the 'A' schedule, on 23/9/1999 in favour of the



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plaintiffs. Possession was handed over. Since the plaintiffs are in possession of the first schedule, the western portion of the first schedule was allotted to the first defendant. The first defendant has no right or interest over the first schedule property. She is making arrangement to sell the property. So, notice was issued on 18/07/2011. But in-spite of the notice, the first defendant is now making arrangement to sell the property. The suit is laid for declaration that the suit first schedule absolutely belongs to the plaintiffs and for consequential injunction or in the alternative prayer sought to divide the second schedule property into two equal shares and allot one to the plaintiffs and for costs.

4.The first defendant filed written statement stating that original ownership is admitted. The second schedule originally belongs to Lakshmana Nadar ancestrally. Survey Nos.563/1, 561/3 and 563/2 were purchased by Lashkmana Nadar on 23/06/1942. He was in possession and enjoyment of the entire properties. He died leaving behind the first defendant and one Arumuga Nainar @ Kasi Nadar in 1963. Arumuga Nainar married one Janaki. Through Janaki he had no children. Janaki died. So, he married the first defendant namely Saraswathi.



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Arumuga Nainar @ Kasi Nadar executed a gift settlement deed in respect of his half share in Survey Nos.563/1 and 563/3 in favour of the first defendant on 04/08/1972. Ever-since, he is in possession and enjoyment of the properties in survey Nos.563/1 and 563/3.

5.After the death of Lakshmana Nadar for about 6 years, the property was enjoyed by the first defendant and Arumuga Nainar @ Kasi Nadar. On 08/11/1974, they divided the properties orally. By that partition, the property in Survey No.563/2 measuring about 0.08.0 Hectare was allotted to the first defendant along with some other properties. Arumuga Nainar @ Kasi Nagar was allotted with the property situated in Survey No.402/4 measuring about 8-1/2 cents along with the rights in the well and other properties. After that, Arumuga Nainar @ Kasi Nadar has no right in Survey No.563/2 and other properties were sold by the parties subsequent to the partition including Arumuga Nainar @ Kasi Nadar and the second defendant, etc.

6.Right from 1974, the first defendant is in possession and enjoyment of the suit property. There is no demarcation of boundary in the second item dividing east and west. She prescribed title over the second item



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by virtue of adverse possession. The suit properties were later settled in favour his son by name Muppulimadan @ Kannan on 07/10/2010 and ever-since he is in possession and enjoyment of the suit property. He is also necessary party for the suit. Since he is not added as a party, the suit is bad for non-joinder of necessary party. Court fee paid is also not correct.

7.Written statement filed by the first defendant was adopted by the defendants 3 and 4. 2nd defendant remained ex-parte before the trial court.

8.Reply statement was filed by the plaintiffs to the written statement with the following averments:-

The gift deed, dated 04/08/1972 is denied as false. It was never executed by Kasi Nadar. But Kasi Nadar has no alias as Arumuga Nainar. Oral partition in the year 1974 is denied as false. The possession claimed by the first defendant is also denied. So, the gift deed executed by the first defendant in favour of his son by name Muppulimadan @ Kannan.



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9. On the basis of the pleadings. the following issues were framed by the trial court:-

(1) Whether the plaintiffs are entitled to declaration and permanent injunction as prayed for?

(2) Whether the plaintiffs are entitled to the alternative relief of partition?

(3) What other reliefs, the plaintiffs are entitled to?

10. Before the trial court, on the side of the plaintiffs, one witness was examined and 8 documents marked. On the side of the defendants, 2 witnesses were examined and 9 documents were marked.

11. At the conclusion of the trial process, the trial court dismissed the suit filed by the plaintiffs. Against which, they preferred appeal in AS No.15 of 2018 before the Additional District Judge, Tenkasi. That came to be dismissed concurred with the judgment and decree of the trial court.

12. Against which, this second appeal is preferred by the plaintiffs as appellants.



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13. Heard both sides.

14. At the time of admission, the following questions of law were framed by this court:-

(i) Whether the courts below were right in drawing presumption as to the genuineness of Ex.B1, namely Settlement Deed dated 04/08/1972, on the ground that it is a 30 years old document, overlooking the fact that presumption is rebuttable presumption?

(ii) Whether the courts below were right in ignoring the evidence on record, which goes a long way to show that Arumuga Nainar Nadar and Kasi Nadar are not one and the same person?

15. Before we go into the first substantial question of law, the second question of law must be taken up for discussion first. The entire case revolves around this issue.



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16.It is the specific case of the first defendant that Kasi Nadar had alias name Arumuga Nainar Nadar. It is denied by the plaintiffs namely the appellant herein, absolutely there is no such alias name for Kasi Nadar. He was never called as 'Arumuga Nainar Nadar' also. It is further submitted that the trial court as well as the first appellate court without any basic evidence in this regard, came to a conclusion merely on the basis of the illusory presumption.

17.So the question, which arises for consideration is whether the finding of the trial court as well as the appellate court in this regard is purely illusory in nature or supported by any evidence direct or indirect.

18.The trial court and the first appellate court committed a mistake in casting burden of proof upon the plaintiffs to show that Kasi Nadar has no alias name. It is the specific case of the first defendant. So, the first defendant ought to have put with the burden to prove that fact. Because, a person who put forth a particular fact and compels the court to believe the stand of such fact, the burden of proof lies upon him. This is the basic and fundamental.



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19. Ignoring the mistake committed by the trial court as well as the first appellate court, now we will see whether any evidence is available on this aspect either direct or indirect as mentioned above.

20. Contra evidences have been let in by both sides as to the issue in the form of certificate obtained from the school where Kasi Nadar alias Arumuga Nainar Nadar alleged to have educated. The Author of these two documents namely Ex.A8 marked on the side of the plaintiffs and Ex.B6 marked on the side of the defendants were not examined. Because of the non-examination, these two documents ought to have been excluded from consideration. Accordingly, these two documents were excluded from consideration.

21. Another important aspect is that the first defendant namely Saraswathi, who is the second wife of Kasi Nadar was not examined (I am consciously omitting to call Kasi Nadar's by his alias name Arumuga Nainar Nadar for obvious reasons). She remained *ex-parte* before the trial court as well as the first appellate court. She is more competent to speak about this aspect than any other persons or documents. Why she has not chosen to appear or remained *ex-parte* is not known. Now this court is



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handicapped with the absence of the best possible evidence.

22.With this handicap in mind, we will go further on this aspect.

23.As mentioned above, except the school certificate, no other direct evidence is available to show that Kasi Nadar's alias name was Arumuga Nainar Nadar. In the absence of any direct evidence, we can look into the indirect evidence or circumstantial evidence to draw the probable presumption.

24.In Ex.B1 the name is mentioned as Arumuga Nainar Nadar, s/o.Lakshmana Nadar. He has put his left hand thumb impression in the document and not the signature. Since it is 30 years old document, it was believed by the trial court as well as the first appellate court. This will be taken up later for our discussion as to the reliability of the document. The first defendant, while executing the settlement deed in favour of the plaintiffs namely Murugan and Lakshmanan has not called her husband by alias name. She has mentioned her husband name only as Kasi Nadar. We find in the revenue documents in Ex.B4, the name of Arumuga Nainar Nadar, S/o.Lakshmana Nadar.



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It is pertaining to Survey No.401/9, 402/4D. Ex.B5 is relating to the encumbrance certificate, wherein the gift deed, dated 04/08/1972 is mentioned probably on the basis of the Ex.B1, which is not relevant to the present suit. We can discard that document also.

25. Another document relied by the defendants is the sale deed executed by Arumuga Nainar Nadar and Saraswathi Ammal in favour of Kuthalingam in respect of the properties mentioned in Survey No.402/4 (This certificate is pertaining to Ex.B5) to show that Kasi Nadar had alias name also. But the parties to the documents were not examined on either side. Mere production of the document will not part take the character of the proof. But this document was relied on for some other purpose, we can come to that later.

26. Now the oral evidence is in the form of DW2. He has stated that Kasi Nadar had alias name also, no other person in the name of Arumuga Nainar Nadar is available in his village. But during the cross examination, he turned against the defendants and stated that Arumuga Nainar Nadar had no alias name called 'Kasi Nadar'. So the evidence is not helpful to the court, on that aspect. In the absence of any direct evidence, we can rely upon the circumstantial evidence on that point.



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27.The learned counsel appearing for the respondents would submit that accepting the partition, the second defendant as well as the plaintiffs have sold other properties. If really Arumuga Nainar Nadar, who is the executant of Ex.B1 is not related, either to the family or to the properties, they ought to have transacted the properties, which belong originally to Lakshmana Nadar the father of Kasi Nadar and the first defendant.

28.Now we will go to the evidence of PW1. The plaintiffs admitted that the particulars of the suit was known to their mother namely the second defendant herein. It is also admitted by PW1 that the mother is taken care by him. The mother accompanied him to give instruction to the Advocate. But, as mentioned above, she remained *ex-parte*. As mentioned above, she is a more competent person to speak about the affairs of her husband. Having went to the Advocate office to give instructions, purposely she remained *ex-parte*. This also assumes importance, because she executed the sale deed, dated 23/01/1979, as mentioned above, in favour of Kuthalingam in respect of the properties mentioned in Survey No.402/4. As mentioned above, her husband name is mentioned as Arumuga Nainar Nadar.



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29.More importantly, it is admitted by the plaintiffs themselves that at the time of filing the suit, they obtained encumbrance certificate. In that encumbrance certificate, they found that Arumuga Nainar Nadar executed a settlement deed in favour of the first defendant. Having known this fact, in the plaint, they have not mentioned anything about this fact. The second defendant purposefully avoided to participate in the trial process, either as a party or witness to overcome the embarrassment that may be caused to her in the form of Ex.B9, the copy of the sale deed executed by her along with her husband in favour of Kuthalingam. These are the circumstances, which are available to show that Kasi Nadar had alias name also. So, this is the probable fact that that was drawn by the trial court as well as the first appellate court though for different reasons.

30.So, the second substantial question of law is answered that by way of indirect evidence, the defendants have established the probability of fact that Kasi Nadar had alias name Arumuga Nainar Nadar.

31.Now coming to the first substantial question of law, it is submitted by the appellants that no presumption under section 90 of the Indian Evidence Act,



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with reference to the contents of the documents can be drawn, but only with reference to the genuineness namely the execution, parties and due registration etc. This argument was advanced with an idea that from this document, no inference can be drawn that Kasi Nadar had alias name by Arumuga Nainar Nadar. But in view of the discussion made, this argument does not hold water and it got to be rejected. The learned counsel appearing for the appellants would submit that in Ex.B1, it has been mentioned that Arumuga Nainar Nadar was allotted to the property in a partition. So, according to him in the written statement, no such plea was raised. In para 4 of the written statement, it is mentioned that after the death of the father namely Lakshmana Nadar, his son was in possession for about 6 years. In 1974 only, the properties were divided. But in Ex.B1, as mentioned above, it is stated that the property was allotted to Arumuga Nainar Nadar in a partition. But, according to the defence taken by the defendants that only in 1974, partition was taken. If it is taken to be correct, then Ex.B1 would have not been executed by Arumuga Nainar Nadar. May be a wrong statement has been made by the defendants in the written statements. But that will not improve the case of the plaintiffs. So, this argument does not advance the case of the appellant herein.



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32.Probability of the partition period also stands proved in the form of subsequent encumbrance made by both parties. In the form of Exs.B8 and B8 the revenue documents in the form of Ex.A2. So the first substantial question of law is answered that the trial court as well as the first appellate court have appreciated the oral evidence in respect of Ex.B1 and arrived at a just conclusion and probable one, which requires no interference at the second appellate stage. The plaintiffs have not successfully rebutted the presumption available in favour of Ex.B1.

33.Subsequent events the indirect evidence leads to the conclusion that Ex.B1 has been validly executed by the plaintiffs' father namely Kasi Nadar @ Arumuga Nainar Nadar in favour of the first defendant. None of the substantial questions of law favours the appellant.

34.For all these reasons stated above, I find that the judgment and decree passed by the trial court, as confirmed by the appellate court requires no interference at the hands of this court.



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35. In the result, this second appeal is **dismissed**.

No costs. Consequently, connected Miscellaneous Petition is closed.

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Index:Yes/No
Internet:Yes/No
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To,

1. The Additional Sub Judge,
Tenkasi.
2. The Additional District Munsif,
Tenkasi.
3. The Section Officer,
VR/ER Section,
Madurai Bench of Madras High Court,
Madurai.



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