

(2005) 04 MAD CK 0130

In the Madras High Court

Case No : Second Appeal No. 857 of 1994

Anjammal and Others

APPELLANT

Vs

Amsavalli and Pappammal

RESPONDENT

Date of Decision : 09-04-2005

Acts Referred:

Evidence Act, 1872 — Section 68

Citation : (2005) 04 MAD CK 0130

Hon'ble Judges : AR. Ramalingam, J

Bench : Single Bench

Advocate : S. Ramamurthy, for the Appellant; S. Sounthar, for the Respondent

Final Decision : Dismissed

Judgement

AR. Ramalingam, J.—Aggrieved against the concurrent judgments of the District Judge, Nagapattinam in A.S. No. 79 of 1992 and the Sub Judge, Mayiladuthurai in O.S. No. 112 of 1988 in and by which the relief of partition of half share of the plaintiffs has been negated by dismissing the suit, the plaintiffs have filed this second appeal.

2. The said suit was filed by the plaintiff with the allegations that one Ganapathy Chettiar is the husband of the first plaintiff and father of plaintiffs 2 to 5 and that one Muthukumaran Chettiar, father of defendants 1 and 2 is the brother of the said Ganapathy Chettiar and that as per the partition deed dated 6.5.1929, both Ganapathy Chettiar and Muthukumaran Chettiar got the suit properties to their share and that thereafter both were enjoying the suit properties in common and that thereafter in spite of demand for partition of half share of the plaintiffs, the defendants are not prepared to effect partition and thereby the plaintiffs happened to file the suit for partition.

3. The said suit was resisted by the defendants with allegations that it is true that as per the partition deed of the year 1929, the suit properties came to the share of Ganapathy Chettiar and Muthukumaran Chettiar and that it is not

correct to say that it was enjoyed in common and that in fact both Muthukumaran Chettiar and Ganapathy Chettiar mortgaged the suit properties in favour of one Ramasamy Nainar for Rs.1225/= as per the registered mortgage deed dated 12.6.1961 and that Ganapathy Chettiar received Rs.800/= from the consideration of the mortgage amount and he was not able to pay back the said amount and that in consequence, the said Ganapathy Chettiar executed a registered release deed dated 24.9.1962 in favour of Muthukumaran Chettiar and that thereafter the said Ganapathy Chettiar or his heirs viz., the plaintiff cannot have any right upon the suit properties and that further the said Muthukumaran has executed a settlement deed in favour of his sons viz., the defendants herein on 27.3.1988 and that the settlement deed has been executed by the defendants and they have also alienated a portion of the suit properties in favour of one Rahman Beevi and that considering the close relationship, the plaintiffs were permitted to occupy a portion of the suit property on rental agreement of Rs.25/= per month and that therefore, taking advantage of the possession of the plaintiffs as tenants, they have chosen to file the suit for partition as if they are in joint possession of the suit properties with the defendants and thereby the suit is liable to be dismissed.

4. The plaintiffs have chosen to file reply statement stating that it is not correct to say that the property was mortgaged to Ramasamy Nainar by Ganapathy Chettiar and Muthukumaran Chettiar and from the mortgage amount, Ganapathy Chettiar received Rs.800/= for his family expenses and that since Ganapathy Chettiar was unable to pay back the amount, he executed a release deed in favour of Muthukumaran Chettiar and that on the other hand, Ganapathy Chettiar had no wordly knowledge and taking advantage of such ignorance, Muthukumaran Chettiar would have fraudulently created the documents and even if there is such release deed, that cannot be binding upon the said Ganapathy Chettiar much less his minor sons and that there was no rental agreement between the parties.

5. On trial and after examining plaintiffs 1 and 2 as P.Ws.1 and 2 and two witnesses including the first defendant as DW1 and marking of nine documents as Exs.A1 to A9 and ten documents as Exs.B1 to B10, the Sub Judge, Mayiladuthurai has found and come to the conclusion that the plaintiffs are not entitled to partition of the suit properties and dismissed the suit.

6. On appeal in A.S.No.79 of 1992, the District Judge, Nagapattinam, also has come to the conclusion that Ex.B2 is true and genuine one and dismissed the appeal.

7. The entire evidence available for either side were perused by me in the light of the judgments of both the courts below and the arguments of the counsels appearing for either side in detail. The only question of law urged by the appellants' counsel is to the effect that the release deed marked as Ex.B2 has not at all been legally proved by the defendants and consequently, on the strength of Ex.B2, the defendants cannot be said to have derived title upon the

entire suit properties in a way to deny the half share of the plaintiffs. Coming to the said release deed in question marked as Ex.B2, it is an admitted fact that two attestors to this release deed are one Purushothaman son of Govindasamy Pillai and Ramamirtham son of Govinda Asari and among whom Purushothaman had died and DW2 is the said Ramamirtham.

8. The said DW2 Ramamirtham, being one of the attestors of Ex.B2, has given evidence in the chief examination that he is a resident of Vaathukara Street, Mayiladuthurai and he knows Ganapathy Chettiar and Muthukumaran Chettiar and he has attested Ex.B2 as second witness and he has also put his signature as identifying witness before the Sub Registrar at the time of registration of Ex.B2 and the said Ganapathy Chettiar has put his signatures in Ex.B2 on five places and he also knows the registration of the said release deed in the Sub Registrar's office. However, in the cross examination he has stated that he did not see when Ganapathy Chettiar signed Ex.B2 and he did not know in which place Ex.B2 was written and neither Ganapathy Chettiar nor other witness or scribe signed before him and further, on the request of Muthukumaran Chettiar, he put his signature at the house of Muthukumaran Chettiar and he did not enquire about the other details of Ex.B2 with the said Ganapathy Chettiar and Muthukumaran Chettiar and so on. Therefore, the question arises as to whether the version given by DW2 in the chief examination or the version in the cross examination are acceptable and reliable.

9. The Sub Judge and the District Judge have analysed and appreciated the important aspect that even though DW2 has given one version in chief examination and another version in the cross examination, Ex.B2, as such, has to be construed as proved and true one. As rightly observed by the Sub Judge as well as the District Judge, probably, because of coercive steps taken by the defendants through court like issue of witness warrant, etc., DW2 has chosen to give such a different version or probably, DW2 should have been secretly gained over by the plaintiffs to give a different version to their convenience. More than all, it is to be noted that the executant of Ex.B2 viz., Ganapathy Chettiar is dead and he does not appear to have disputed such execution of release deed at any time between the date of execution of Ex.B2 viz., 24.9.1962 and till his death. Now, the plaintiff has filed this suit in the year 1992 as if the release deed of the year 1962 executed by Ganapathy Chettiar cannot be binding upon him as well as his sons.

10. Further, the fact remains that as per the recitals of Ex.B2, it is revealed that the debt incurred by him along with his brother Muthukumaran Chettiar in having mortgaged the properties in favour of one Ramasamy Nainar and Ganapathy Chettiar was not able to pay back his share of debt to discharge the mortgage and only in that respect, Ganapathy Chettiar has chosen to release his half share of right upon the suit properties as per the release deed in the year 1962 itself.

11. In this context, it is to be noted further that on the date of the suit, this document viz., Ex.B2 of the year 1962 is about thirty years old and it is an

original document and it needs no further more proof. Simply because the heirs of the deceased Ganapathy Chettiar have filed the suit for partition in the year 1992, that too by going to the extent denying the validity of release deed through reply statement only, it cannot be held as if the said release deed marked as Ex.B2 could not be true and valid that too when the executant viz., Ganapathy Chettiar had never disputed the document for so many years till his death. In this connection, section 68 of the Evidence Act has to be taken note of. In other words, as per the proviso to section 68 of the Indian Evidence Act,

"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."

Therefore, the document viz., release deed marked as Ex.B2 happens to be registered document in accordance with the Registration Act, the defendants are not expected to call even the attestors to prove the document before court of law inasmuch as the executor viz., Ganapathy Chettiar died and not chosen to deny the same at any time till his death. Consequently, it is too much on the part of the plaintiffs now to file a suit for partition against the sons of Muthukumaran Chettiar as if they are not bound by the said release deed. Probably, the plaintiffs have chosen to file the suit for partition since the defendants have alienated some portion of the suit properties in favour of one Rahaman Beevi.

12. In such circumstances, I do not find any illegality or perversity upon the judgments of both the courts below in a way inviting this court to interfere with such concurrent judgments in the second appeal. Therefore, the second appeal has no merits under law or on facts and thereby it fails and is dismissed with costs.