

(2013) 08 MAD CK 0244

In the Madras High Court

Case No : S.A. No. 423 of 2010 and M.P. No's. 1 of 2010 and 1 of 2011

S.D. Ramanathan (died) and Others

APPELLANT

Vs

Baby Ammal (died) and Others

RESPONDENT

Date of Decision : 29-08-2013

Acts Referred:

Citation : (2013) 5 LW 450 : (2014) 1 MLJ 515

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Advocate : W.M. Abdul Majeed, for the Appellant; P.L. Narayanan, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Shivakumar, J.—Defendant Nos. 2 to 8 in the Original Suit are the appellants in the second appeal. The plaintiffs 1 to 4 in the Original Suit are the respondents 1 to 4 in the second appeal. The first respondent Baby Ammal is no more. On the death of the first respondent, the 5th respondent Mohandas Reddiar has been impleaded as the legal representative of the deceased first respondent Baby Ammal by order dated 11.04.2012 made in M.P. No. 4/2012. Respondents 1 to 4 in the second appeal filed the suit O.S. No. 1883/2004 on the file of the District Munsif Court, Vellore for declaration of title to the suit property, recovery of vacant possession and for mesne profits. The suit was dismissed by the trial court without cost by its judgment and decree dated 03.02.2008. On an appeal preferred by the respondents 1 to 4 (plaintiffs) in A.S. No. 9/2009 on the file of the Sub Court, Vellore, the learned Subordinate Judge reversed the judgment of the trial court and decreed the suit with cost regarding the prayers for declaration and recovery of possession. The learned Subordinate Judge has also found the plaintiffs entitled to recover a sum of Rs. 700/- per month as mesne profits from the date of filing of the suit till delivery of possession. Since the first defendant is no more, the other defendants, namely defendants 2 to 8 have chosen to file the present second appeal challenging the decree of the lower

appellate court reversing the decree passed by the trial court. For the sake of convenience, the parties shall be referred to in accordance with their ranks in the Original Suit and at necessary places, description of the parties with their ranks in the second appeal shall be provided. The Original Suit was filed on the basis of the plaint averments, which are in brief, as follows:

The suit property was purchased by Hamsaveni Ammal, the mother of Baby Ammal (first plaintiff) as a vacant site under a registered sale deed dated 27.08.1958. Hamsaveni Ammal, in turn, sold it to the first defendant S.M. Duraisamy Reddiar (since deceased), who was none other than her husband and the father of the first plaintiff, under a registered sale deed dated 16.12.1960. The deceased first defendant S.M. Duraisamy Reddiar took a loan of Rs. 10,000/- from Vellore Town Co-operative Building Society and constructed a building. Thereafter he executed a registered Settlement Deed dated 15.12.1962 conferring life interest on Hamsaveni Ammal and after the death of Hamsaveni Ammal in favour of the first plaintiff Baby Ammal and conferring absolute title on the plaintiffs 2 to 4, who would get it after the death of the first plaintiff subject to the life interest created in favour of Hamsaveni Ammal and the first plaintiff. The said S.M. Duraisamy Reddiar died in or about 1973. Thereafter Hamsaveni Ammal also died on 14.01.1993. On the death of Hamsaveni Ammal, the first plaintiff Baby Ammal (since deceased) got the property to be enjoyed till her death without causing any alienation or encumbrance. After the death of Hamsaveni Ammal, possession of the property should have gone to the first plaintiff, but the first defendant, who was residing with Hamsaveni Ammal continued to be in possession. As such the property and the original title deed would be deemed to be in his illegal possession. The plaintiffs 1 to 4 approached the first defendant after the death of Hamsaveni Ammal and asked him to vacate and hand over possession of the suit property. But the deceased first defendant was evading the same. Hence the first plaintiff was constrained to issue a legal notice dated 15.08.1994 to the first defendant demanding delivery of vacant possession of the suit property to the first plaintiff and also claiming damages for use and occupation at the rate of Rs. 750/- per month. The first defendant gave a false reply on 12.09.1994 alleging that he got the property by virtue of a registered Will executed by his mother, namely Hamsaveni Ammal. Hamsaveni Ammal did not have any alienable right in the suit property. The first defendant having attested the Settlement Deed executed by S.M. Duraisamy Reddiar is estopped from setting up an absolute title in Hamsaveni Ammal to be derived by him from her by virtue of her Will. Hence the plaintiffs are constrained to file the suit for declaration of their title, recovery of possession and also recovery of damages for use and occupation.

2. The deceased first defendant, who was originally the sole defendant, filed a written statement containing the following averments:

The first defendant's mother's mother Bangarammal inherited a lot of properties at Thuthipattu and Ariyur villages from her husband. She executed a partition

deed in 1953 in favour of the first plaintiff, the first defendant and his brother. At that point of time, the first defendant and the first plaintiff were minors and their mother Hamsaveni Ammal acted as guardian for the execution of the said Partition Deed. Thus Hamsaveni Ammal got the landed properties and she was deriving a lot of income from the said properties. Out of the income derived from the said properties, Hamsaveni Ammal purchased the suit property in the year 1958. Her husband Duraisamy Reddiar, who was the father of both the plaintiff and the first defendant, was not having any income and he was maintained by Hamsaveni Ammal. When she wanted to put up a house in the property purchased by her and when she approached the Vellore Town Co-operative Building Society for a loan, the same was declined stating that loans would not be given to female applicants. Hence she executed the sham and nominal sale deed in the year 1960 in favour of her husband Duraisamy Reddiar so as to enable him to get a loan from the above said society. Duraisamy Reddiar obtained a loan of Rs. 10,000/- from Vellore Town Cooperative Building Society by creating a mortgage in favour of the Society in respect of the suit vacant site and with the help of the loan amount, he constructed the house in which Hamsaveni Ammal and her husband were living together till the death of her husband Duraisamy Reddiar. Since the sale deed executed in favour of Duraisamy Reddiar was sham and nominal, no title or interest was acquired by him and the title continued to vest with Hamsaveni Ammal. As the loan obtained from Vellore Town Cooperative Building Society was not discharged, the property was brought for sale in 1982 and at that point of time Hamsaveni Ammal paid a sum of Rs. 11,563.54P to the Society and got the mortgage discharged. Since Hamsaveni Ammal did not treat the sale deed in favour of her husband as a real transaction, she treated the property as her own and the same was the reason why she executed a Will dated 02.12.1992 in favour of the first defendant bequeathing the suit property along with other properties. Hamsaveni Ammal died on 14.11.1993 due to heart attack. After her death, the Will was probated by the District Judge, Vellore on 16.12.1993. Apart from the derivation of title under the Will, the first defendant was in possession and enjoyment of the suit property from the date of purchase and thereby he had perfected title by adverse possession. The Settlement Deed allegedly executed by S.M. Duraisamy Reddiar is a fraudulent and fabricated one and the same shall not be binding on the first defendant. The plaintiff's averment that the first defendant was the attester of the Settlement Deed is not true. The suit is devoid of merits and the same is not maintainable. Hence the suit should be dismissed with cost.

3. The first defendant also filed an additional written statement containing the following averments:

Since the first plaintiff got only a life interest, she cannot maintain the suit for declaration and other reliefs. The plaintiffs 2 to 4 can claim their right in respect of the suit property only after her death. Hence the suit filed by them for recovery of possession is premature and not maintainable. The suit property is worth Rs. 5,00,000/-, but the plaintiffs have grossly undervalued the same

providing Rs. 75,000/- as its value. Due to gross and under valuation of the suit property, lesser court fee has been paid. On this ground also the suit should be dismissed.

4. During the pendency of the suit, the first defendant died and the defendants 2 to 8 were impleaded as his legal heirs. Based on the above said averments, the learned trial judge framed as many as eight issues and conducted trial, in which the first plaintiff was examined PW. 1 and eight documents were marked as Exs.A1 to A8 on the side of the plaintiff. Two witnesses were examined as DWs. 1 and 2 and twenty two documents were marked as Exs.B1 to B22 on the side of the defendants. The learned trial judge disbelieved the case of the plaintiffs and accepted the defence plea made by the first defendant with the result that the suit was dismissed with cost by the trial court vide its judgment and decree dated 03.03.2008.

5. Aggrieved by and challenging the decree of the trial court, the plaintiffs preferred an appeal in A.S. No. 9/2000 on the file of the Sub Court, Vellore. The learned Subordinate Judge, Vellore allowed the appeal, set aside the decree passed by the trial court and decreed the suit as prayed for in respect of the reliefs of declaration and recovery of possession. So far as the prayer for damages, use and occupation is concerned, the learned appellate judge fixed a sum of Rs. 750/- per month as damages for use and occupation from the date of suit till delivery of possession. One month time was also granted for effecting delivery of possession. The said judgment and decree of the lower appellate court dated 31.12.2004 are challenged in the present second appeal on various grounds set out in the memorandum of grounds of appeal.

6. The second appeal was admitted on the following substantial questions of law.

1) Whether the lower appellate court was right in holding that Ex.A3 was accepted and acted upon by the settler, when the plaintiffs themselves admitted that they had no knowledge about Ex.A3 and the defendants are in possession and enjoyment of the property for more than 30 years even after the execution of Ex.A3?

2) Whether the lower appellate court was right in holding that Ex.B22 was not proved in the manner known to law under Ex.B3, when the appellants proved the same in the present suit proceedings by examining the attestor of the Will?

7. The arguments advanced by Mr. W.M. Abdul Majeed, learned counsel for the appellants and by Mr. P.L. Narayanan, learned counsel for the respondents were heard. The materials available on record were also perused.

8. The plaintiffs 1 to 4 filed the suit for declaration of their title to the suit property, for recovery of possession of the suit property and for mesne profits. It is an admitted case of both the parties that the land measuring 1672 sq.ft. comprised in T.S. No. 1560 in Ramachari Street, Municipal Ward No. 24, Vellore Town, Kosapet was purchased as a vacant site by Hamsaveni Ammal under a sale

deed dated 27.08.1958. Certified copies of the said Sale Deed executed by Sivasankara Mudaliar and others in favour of Hamsaveni Ammal has been produced and marked as Exs.A1 and B1. The said Hamsaveni Ammal is none other than the mother of Baby Ammal, the first plaintiff and deceased S.D. Ramanathan, the first defendant. S.M. Duraisamy Reddiar was the father of first plaintiff and the first defendant. It is also not in dispute that Hamsaveni Ammal executed a sale deed conveying the said property to her husband S.M. Duraisamy Reddiar on 16.12.1960. A registration copy of the said sale deed dated 16.12.1960 has been marked as Ex.A2. After having purchased the said land as a vacant site under the original of Ex.A2, S.M. Duraisamy Reddiar availed a housing loan from Vellore Town Cooperative Building Society mortgaging the same and constructed a house therein. The land which was the subject matter of the sale under Ex. A1 as well as Ex. A2 and the building put up by S.M. Duraisamy Reddiar with the funds raised by availing the loan from the Society have been shown to be the subject matter of the present suit.

9. According to the plaintiffs, S.M. Duraisamy Reddiar executed a registered Settlement Deed conferring successive life interests on Hamsaveni Ammal and the first plaintiff Baby Ammal and thereafter absolute title on the children of Baby Ammal. According to the plaintiffs, on the death of S.M. Duraisamy Reddiar, Hamsaveni Ammal was in possession and enjoyment of the suit property by virtue of the life estate created in her favour under the said Settlement Deed and after the death of Hamsaveni Ammal, the first plaintiff Baby Ammal who was living in that house along with Hamsaveni Ammal, took the original deeds and continued to reside there and refused to hand over possession of the suit property to plaintiff's life estate holder. The said claim of the plaintiffs was disputed by the first defendant and hence the plaintiffs had to file the suit for declaration, recovery of possession and other reliefs.

10. It is an admitted fact that S.M. Duraisamy Reddiar died in or about 1973. After the death of S.M. Duraisamy Reddiar, his wife Hamsaveni Ammal lived for about 20 years and died on 14.01.1993. The death register extract of Hamsaveni Ammal has been marked as Ex.B4. In case of substantiation of the Settlement Deed dated 15.12.1962, the claim of the plaintiffs shall be sustained. However the defendants took a plea that the suit is bound to fail because the first plaintiff Baby Ammal was not entitled to the relief of declaration, since she was only a life interest holder under the Settlement Deed and that the suit by the other plaintiffs was bound to fail as premature, since the same had been filed during the life time of the first plaintiff, namely the life estate holder. The said contention of the defendants was rightly rejected by the learned lower appellate judge holding that the first plaintiff being the life estate holder and the other plaintiffs, who were to get the property absolutely on the death of their mother, namely the first defendant, were entitled to seek a declaration of their title and recovery of possession of the suit property to be enjoyed by the first defendant till her death and thereafter by the other plaintiffs. The plea questioning the maintainability of the suit was rightly rejected by the learned lower appellate

judge and this court does not find any defect or infirmity in it warranting any interference with the same.

11. However, the defendants had taken a defence plea denying the claim of the plaintiffs on merits on the basis of the following contentions:

When Hamsaveni Ammal approached Vellore Town Cooperative Building Society for loan, the Society refused to sanction a loan to her. Hence for the purpose of availing a loan to construct a house, Hamsaveni Ammal executed a sham and nominal sale deed on 16.12.1960 in favour of S.M. Duraisamy Reddiar, namely her husband. The transaction being sham and nominal, S.M. Duraisamy Reddiar did not get any title. Though the house was put up using the loan amount availed in the name of S.M. Duraisamy Reddiar from the Society, Hamsaveni Ammal never parted with the property and she continued to possess the property as her own. In exercise of her own right as absolute owner of the property, Hamsaveni Ammal executed an unregistered will dated 02.12.1992 bequeathing the said property in favour of the first defendant S.D. Ramanathan.

12. Ex.B3 is the certified copy of the order passed in the probate proceedings, namely Probate O.P. No. 2/1993 on the file of the District Judge, Vellore. Ex.B22 is the certified xerox copy of the Will, which was probated as per Ex.B3 order. Of course an order in the probate proceedings is a decision in rem, which shall be binding on the parties to the said proceedings and also persons, who were not parties to the said proceedings. Ex.B3 shows that attestors of the Will were examined before the Probate court and the conditions for proof of a will stipulated in Section 68 of the Indian Evidence Act had been complied with. In the normal circumstances, the order passed in the probate proceedings probating the will shall be binding the whole world including the plaintiffs. Section 41 of the Evidence Act deals with the relevancy of judgments in probate proceedings, which reads as follows:

41. Relevancy of certain judgments in probate, etc., jurisdiction.- A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any, legal character, or which declares any person to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant. Such judgment, order or decree is conclusive proof-

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation; that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or

should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

Section 41 makes a grant made by a competent probate court conclusive proof of the due execution and validity of the Will. The defendants rely on the Will dated 02.12.1992 projected as the last Will and testament left by Hamsaveni Ammal. The said Will has been probated by the learned District Judge in Probate O.P. No. 2/1993. Certified copy of the probate order, to which the Will has been annexed, has been produced as Ex.B22. No one can contend in a civil court raising any questions regarding the testamentary capacity or the sound disposing state of mind or citing any vitiating factor relating to the execution of the Will, since such questions could have been raised in the probate proceedings. Any person aggrieved by the grant of probate may approach the probate court for revocation of such grant. Unless and until the grant is revoked, the question of due execution and validity of the Will cannot be raised in any proceedings before a civil court. The above said general principle is not without any exception. They are 1) the grant was made by a court having no jurisdiction and 2) the grant was obtained by fraud.

13. Though a judgment or order in the probate proceedings shall be a conclusive proof of the factum of execution of the Will, capacity of the testator and the sound disposing state of mind, the same was not a proof of title of the testator to the properties dealt with under the Will. There is a long line of cases, wherein it has been held that a final order of a competent probate court granting probate is conclusive proof of due execution and validity of the Will as well as its contents and so long as a grant of probate issued by a probate court is in force, it shall not be open to a party to question it in a civil court except on any of the grounds mentioned in Section 44 of the Indian Evidence Act. Section 44 of the Evidence Act says that a fraud or collusion in obtaining the judgment or the incompetence of the court which made the grant can be proved and in such cases, the order of probate shall not be conclusive proof. Section 44 reads as follows:

44. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.--Any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under sections 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

Hence it is quite obvious that though Section 41 makes an order of probate court a conclusive proof of due execution and validity of the Will, the opposite party can prove that the order of the probate was granted by an incompetent court or that the order was obtained by fraud or collusion.

14. In this case, it is patent that the first plaintiff Baby Ammal and the first defendant S.D. Ramanathan were the daughter and son of Hamsaveni Ammal. If

at all there would be any person really interested in contesting the application for probate of the Will allegedly executed by Hamsaveni Ammal bequeathing her property in favour of her son, namely the first defendant alone, it shall be the first plaintiff Baby Ammal. The first defendant, who applied for probate, ought to have made the first plaintiff as a party to the probate OP. In addition, the plaintiffs have relied on a settlement deed executed by S.M. Duraisamy Reddiar under which Hamsaveni Ammal and Baby Animal got life interest and the plaintiffs 2 to 4 were to become absolute owners after the death of Hamsaveni Ammal and Baby Ammal. When such is the case, not only the first plaintiff, but also the other plaintiffs were the persons interested in the outcome of the probate proceedings. They ought to have been made parties to the probate proceedings. What the first defendant did was to make one Ramakrishnan Reddiar, who had no interest at all, as a name sake respondent, who also made an endorsement on the probate petition that he had nothing to do with the Probate OP and he was not interested in it. Hence it is quite obvious that the first defendant omitted to make the interested persons as parties to the probate proceedings and deliberately made a third person as a respondent, who also made an endorsement that he did not have any interest in the petition. The said act on the part of the first defendant will amount to collusion between him and the said Ramakrishnan Reddiar and a fraud was played in obtaining the order of probate. Therefore, the lower appellate court has rightly held that Ex.B3-Order was obtained by fraud and collusion and hence the same shall not amount to conclusive proof of the alleged Will dated 02.12.1992 left by Hamsaveni Ammal. In this case, the original Will has not been produced and a xerox copy attached to the probate order has been produced.

15. The third defendant, who deposed as D.W.1, simply stated that he was present at the time of writing the Will. But he would further state that he did not know who wrote the Will and at what time the Will was written. He also stated that he did not know who were all the persons who signed in the Will. Therefore, the evidence of D.W.1 shall not help the defendants to prove due execution and validity of the Will propounded by the defendants. One Ranganathan projected as an attester of the Will has been examined as D.W.2. His evidence in chief was adduced in the form of a proof affidavit. Though it had been stated that on 02.12.1992 at about 8.30 a.m. on the invitation of Hamsaveni Animal he went to her house, Kothandaraman, Vinayagam and Hamsaveni Ammal were there; that Kothandaraman read out a Will to Hamsaveni Ammal and Hamsaveni Ammal agreed that the same had been prepared according to her instructions and thereafter the Will was signed by Hamsaveni Ammal and following her he along with Vinayagam signed it. During cross-examination, there was a shift in his evidence as he stated that the Will, which had already been prepared was placed in his hands and he was asked to read. In addition, in the cross-examination he had stated that he did not sign the Will on the date on which he was asked to read it. It is also his evidence that he was not aware whether any correction had been made in the Will. The entire evidence of D.W.2 was considered in proper

perspective by the lower appellate judge and the lower appellate judge came to a correct conclusion that the Will allegedly executed by Hamsaveni Ammal was not proved. There is no defect or infirmity in the said finding of the learned lower appellate judge.

16. The production of the probate order has been successfully challenged by the plaintiffs and proved that the same was obtained by collusion and fraud. The learned lower appellate judge has rightly held that the probate order produced as Ex.B3 would not be conclusive proof of the due execution and validity of the Will, since the said order has been proved to be obtained by fraud and collusion. So far as the proof of the Will is concerned, the original will has not been produced and the evidence is not reliable, as pointed out supra. On a proper re-appreciation, the learned lower appellate judge has come to the conclusion that the will has not been proved by the defendants. The said finding cannot be termed either infirm or defective, much less perverse. Accordingly, the second substantial question of law is answered in favour of the respondents and against the appellants.

17. We have seen that the defendants have failed to prove the Will dated 02.12.1992 allegedly executed by Hamsaveni Ammal. Even if it is assumed that the execution of the said Will is proved, the same will not have the effect of defeating the claim of the plaintiffs, who base their claim not as testamentary or intestate legal heirs of Hamsaveni Ammal, but as the beneficiaries under a Settlement Deed executed by S.M. Duraisamy Reddiar, a registration copy of which has been marked as Ex.A3. The first defendant is an attester of the said settlement deed dated 15.12.1962. The defendants have not disputed the factum of execution of the settlement deed by S.M. Duraisamy Reddiar. On the other hand, they contend that the said settlement was not given effect to and was not acted upon. In support of their contention, the defendants contend that Duraisamy Reddiar did not have any title to the suit property and it was Hamsaveni Ammal, who continued to be the owner of the suit property right from the date of purchase under Ex.A1. Though the defendants have admitted that Hamsaveni Ammal executed the sale deed dated 16.12.1960 in favour of her husband S.M. Duraisamy Reddiar, a registration copy of which has been marked as Ex.A2, they would contend that the same was only a sham and nominal transaction. The reason assigned by them for entering into such a sham and nominal transaction is that the Society refused to give housing loan to Hamsaveni Ammal and hence for availing the housing loan, the sale deed was executed in favour of S.M. Duraisamy Reddiar as a sham and nominal deed. The person, who claims a document to be a sham and nominal, is bound to prove it.

18. In this case, admittedly after the execution of the sale deed in favour of Duraisamy Reddiar, it was Duraisamy Reddiar, who got the loan from the Society and the house was put up using the housing loan availed by him. It has also been admitted by D.W.1 that till the death of Duraisamy Reddiar, the revenue records and house tax assessment stood in the name of Duraisamy Reddiar. It is

also admitted by D.W.1 that the loan amount was repaid to the Society in 1982, namely after 9 years from the date of death of S.M. Duraisamy Reddiar. The settlement deed came to be executed on 15.12.1962. Admittedly, it was stipulated in the settlement deed that Hamsaveni Ammal should repay the loan amount of Rs. 10,000/- availed from the Society. Particularly D.W.1 (3rd defendant) has admitted the same. Therefore, there is no surprise in Hamsaveni Ammal repaying the loan amount and getting the cash receipt under Ex.B2 on 14.06.1982. Even in the copy of the Will relied on by the defendants, nothing has been mentioned about the execution of any sham and nominal sale deed in favour of S.M. Duraisamy Reddiar. The absence of consideration for Ex.A2-sale deed has not been admitted by the plaintiffs. The reason assigned by the defendants for executing the sham and nominal sale deed also cannot be accepted. D.W.2 in his evidence has made a clear admission regarding the genuineness of the same. There is no evidence on the side of the defendants to the effect that there was no absence of consideration for the sale under Ex.A2. On the other hand, D.W.1 has admitted that S.M. Duraisamy Reddiar was a contractor and Hamsaveni Ammal sold the vacant site to S.M. Duraisamy Reddiar and that S.M. Duraisamy Reddiar mortgaged the same with the Vellore Town Cooperative Building Society, obtained a loan of Rs. 10,000/- and constructed the house. The vernacular portion in his testimony is extracted here under:

After having made such an admission, D.W. 1 chose to give a different version by stating that the sale deed was executed in favour of Duraisamy Reddiar, since the Society was not prepared to give loan to female applicants and that the house was put up with the help of a loan obtained in the name of S.M. Duraisamy Reddiar and the savings of Hamsaveni Ammal. There is no evidence, oral or documentary to show that the Cooperative Society was not in the habit of advancing loan to female applicants. However, again during the later part of the cross-examination, he has admitted that the loan was obtained in the name of Duraisamy Reddiar and there was no document in the name of Hamsaveni Ammal in this regard. It is also pertinent to note that the originals of Exs.A1 and A3 have not been produced. If at all Ex.A2 had been executed as a sham and nominal deed, the title deeds would have been with Hamsaveni Ammal. D.W. 1 would state that the originals were not with them and that he did not know what happened to the originals. The inference shall be that the original title deeds had been deposited with the Cooperative Building Society. Clear evidence has also been adduced on the side of the plaintiffs that the original settlement deed was also available with Hamsaveni Ammal. Cleverly the defendants have failed to produce those documents. Only in an attempt to show that the settlement was not acted upon and Hamsaveni Ammal was not aware of the settlement deed till her death. The evidence of D.W. 1 in this regard is crucial. He said that he pleaded absence of knowledge as to the execution of the settlement deed dated 15.12.1962. The portion of his deposition in vernacular reads as follows:

The above said evidence will show that there is no denial of execution of the settlement deed dated 15.12.1962, a registration copy of which has been

marked as Ex.A3. D.W.1 has admitted that the title deeds relating to the suit property are in the hands of the third persons.

19. Excepting the interested testimony of D.W.1, which is also not cogent, there is no reliable evidence to show that under Ex.A2, a sham and nominal sale deed was executed by Hamsaveni Ammal. The evidence adduced on the side of the plaintiffs is enough to prove the execution of the settlement deed dated 15.12.1962, a registration copy of which has been marked as Ex.A3. On the contrary, there is absence of sufficient and reliable evidence to show that the existence of the settlement deed was not known to either Hamsaveni Ammal or to the defendants till the death of Hamsaveni Ammal. When Ex.A2-sale deed has not been proved to be a sham and nominal one, the necessary consequence shall be that the Will shall be ineffective. It is obvious that the Will has been brought into existence only for the purpose of nullifying the Settlement Deed under Ex.A3.

20. In Vimal Chand Ghevarchand Jain and Others Vs. Ramakant Eknath Jajoo, , the Hon''ble Supreme Court has observed that a registered Deed of sale carries presumption that the transaction was a genuine one and if the execution of the sale deed is proved, the onus is on the defendant to prove that the deed was not executed and it was a sham and nominal transaction. The following are the observations made by the Hon''ble Supreme Court:

36. If the appellants were able to prove that the deed of sale was duly executed and it was neither a sham transaction nor represented a transaction of different character, a suit for recovery of possession was maintainable. A heavy onus lay on the respondent to show that the apparent state of affairs was not the real state of affairs. It was for the defendant in a case of this nature to prove his defence. The first appellate court, therefore, in our opinion, misdirected itself in passing the impugned judgment insofar as it failed to take into consideration the relevant facts and based its decision on wholly irrelevant consideration.

21. After the execution of the Settlement Deed, Hamsaveni Ammal was in possession of the suit property and S.M. Duraisamy Reddiar was living along with her in the same property. Duraisamy Reddiar died in the year 1973. Thereafter, Hamsaveni Ammal continued to be in possession, only by virtue of the settlement. The interest conferred upon her was to enjoy the property without causing any encumbrance. Ex.A3 also contains a clause that any encumbrance created by Hamsaveni Ammal would not bind Baby Ammal or her children, namely the plaintiffs. Therefore, during the life time of Hamsaveni Ammai, there was no occasion for the plaintiffs to seek recovery of possession, as the right to seek possession of the property accrued only on the death of Hamsaveni Ammal. Till their demand for possession was not complied with, there was no occasion for the plaintiffs to suspect that their title were disputed. Therefore, the plaintiffs have rightly filed a suit for declaring the life interest of the first plaintiff and the absolute title of the other plaintiffs and for recovery of possession of the suit property from the defendants. Since the first defendant refused to deliver possession when demanded by the rightful owners and the defendants continued

to enjoy the properties, the plaintiffs are entitled to the mesne profits. D.W. 1 himself admitted that the property would fetch a sum of Rs. 700/- per month as rent. Therefore, there is nothing wrong in the fixation of mesne profits at the rate of Rs. 700/- per month by the lower appellate court.

22. Besides taking a plea that the settlement deed was not acted upon and it did not come into force, the defendants had also taken a plea that they had perfected their title to the suit property by adverse possession. It is their contention that even after the execution of Ex.A3-settlement deed, Hamsaveni Ammal was in possession and enjoyment and after her death the defendants are in possession and enjoyment; that they continued to be in possession for more than 30 years and that thus they have perfected title by adverse possession. The defendants have committed a blunder by taking pleas, which are mutually destructive of each other. Of course, a plaintiff cannot make inconsistent pleas, but the defendant can raise alternative and inconsistent pleas. But, such alternative or inconsistent pleas should not be mutually destructive of each other. The said aspect has been dealt with by the Hon''ble Supreme Court in Vimal Chand Ghevarchand Jain and Others Vs. Ramakant Eknath Jajoo, . The relevant observation is extracted here under:

25. Pleadings of the parties, it is trite, are required to be read as a whole. The defendants, although are entitled to raise alternative and inconsistent plea but should not be permitted to raise pleas which are mutually destructive of each other.

The defendants have taken a plea that there was no real transaction of sale under Ex.A2 in favour of Duraisamy Reddiar. The said plea will be destructive of the plea of adverse possession and the plea of adverse possession will be destructive of the plea of title based on the stand that Ex.A2 was a sham and nominal deed. For substantiating a plea of adverse possession, the animus to possess it adverse to that of the real owner should be there. If a person believes and claims a property to be his own and is in possession of the same, such possession will not be an adverse possession. The plea of adverse possession itself does have an in built admission that the property belonged to the other person against whom the adverse possession is claimed. Apart from the fact that the defendants have taken inconsistent and mutually destructive pleas, they have also failed to prove such adverse possession. Settlement Deed was executed by Duraisamy Reddiar on 15.12.1962. There is absence of evidence to show that after the execution of Ex.A2-sale deed, Hamsaveni Ammal continued to be in possession of the property and it was she who constructed the building. On the other hand, there is ample evidence to show that her husband Duraisamy Reddiar put up the construction and executed the original Ex.A3-settlement deed. The possession of Hamsaveni Ammal after the date of Ex.A3 could be traced to Ex.A3. Having got possession by virtue of the life estate conferred on her, her possession would not have become adverse to that of the plaintiffs, who were to get the property only after the death of Hamsaveni Ammal. After the

death of Hamsaveni Ammal, the plaintiffs have issued the notice and filed the suit. Hence the plea of adverse possession made by the defendants has miserably failed and the lower appellate court has rightly held that Ex. A3-settlement deed was executed and acted upon by the settles. Accordingly, the first substantial question of law is answered in favour of the appellants and against the respondents.

For all the reasons stated above, this court comes to the conclusion that there is no defect or infirmity in the judgment and decree of the lower appellate court and no case for inference with the same has been made out and that the decree passed by the lower appellate court deserves to be confirmed with the result that the second appeal shall be dismissed. In the result, the Second Appeal is dismissed with cost. Consequently, the connected miscellaneous petitions are closed.