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(2003) 08 MAD CK 0160

In the Madras High Court

Case No : S.A. No. 397 of 1993

Singamuthupillai — APPELLANT

Vs

Pandithurai, Lakshmi Ammal and Commissioner — RESPONDENT

Date of Decision : 14-08-2003

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2003) 08 MAD CK 0160

Hon'ble Judges : M. Thanikachalam, J

Bench : Single Bench

Advocate : S. Vijayakumar, for S. Sundaresan, for the Appellant; S.R. Sundaram, for the Respondent

Final Decision : Allowed

Judgement

M. Thanikachalam, J.—The first defendant failed before the courts below in resisting the suit filed by the plaintiffs for declaration and permanent injunction, successfully, and the result is the second appeal.

2. The respondents 1 and 2 as plaintiffs, have filed the suit for declaration that they are the absolute owners of the suit property, for permanent injunction against the appellant/first defendant from in any way interfering with the peaceful possession and enjoyment of the suit property by the plaintiffs and for mandatory injunction, directing the second defendant to change the register and restore their names in the property register, for the suit property, contending that the suit property originally belonged to one Subramaniya Pillai, who had 5 sons including the first defendant, that the first defendant after the death of his two elder brothers, released his share in favour of two brothers Natesapillai and Shanmugapillai, in pursuance of the family arrangement in or about middle of the year 1945 after receiving a sum of Rs. 400/- in lieu of the share in the joint family, unable to discharge the debts incurred by the family, that thereafter, Natesapilai and Shanmugapillai were enjoying the properties in their own, that Natesapillai died without any issues, leaving the plaintiffs to succeed his share

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also in the suit properties along with the share of Shanmuga Pillai, the husband of the second plaintiff and the father of the first plaintiff, who is also died elsewhere in the year 1969; that thereafter, the plaintiffs alone were enjoying the suit property in their own right, that unfortunately, the first defendant changed the register in the municipal records in the year 1980, falsely claiming share in the suit house, which was objected and that in view of the attitude taken by the first defendant casting cloud over the title of the suit property, the plaintiffs are constrained to file the suit, for the above said relief.

3. The first defendant/appellant opposed the suit for declaration and injunction, contending that after the death of three brothers, the suit property has been in the possession and enjoyment of Natesapillai, Shanmuga Pillai and Singamuthu, that they have discharged the debts also incurred by the family, that at no point of time, the second plaintiff had released her share in the suit property, that the alleged release deed must be a concocted one, since there was no family arrangement of any kind in the year 1945, that even in the year 1972, this defendant and his brother Natesa Pillai mortgaged the property and obtained a loan of Rs. 1750/- and therefore, the claim of the plaintiffs that they are the absolute owners of the suit property is false thereby praying for the dismissal of the suit.

4. The second defendant would contend in the written statement, that the original assessment stood in the name of Natesa Pillai and brothers, that in the year 1984, another claimant had preferred an application for transfer of assessment before the Commissioner, and considering the materials and evidence produced by the first defendant, the assessment of registry was transferred in his name and the second defendant does not claim title or interest over the suit property and in this view, he is unnecessary party, thereby prayed for the dismissal of the suit, as far as the municipality is concerned.

5. The trial court examining the second plaintiff as P.W.1 and one Singamuthu Pillai as P.W.2, exhibited 32 documents as and when produced by the plaintiffs, as their supportive documentary evidence. As against this the first defendant examined himself as D.W.1, seeking aid from Exs.B1 to B14. The learned Principal Subordinate Judge assessing the above materials, has deduced the conclusion that the release deed, namely Ex.A1 was executed by the first defendant, under which he had relinquished his right in the suit property, after receiving a sum of Rs. 400/- and thereafter, he ceased to have any interest in the suit property, whereas the entire property vested with the plaintiffs, that though Ex.A1 is inadmissible as evidence, for want of registration, the same could be admitted as evidence for the collateral purpose, that from the year 1945 or so, in pursuance of the family arrangement, the plaintiffs and their predecessor in interest alone were in possession and enjoyment of the suit property, in which the first defendant/appellant had not exercised any right. Thus concluding, the learned Subordinate Judge decreed the suit as prayed for, without costs on 31.8.1980.

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6. The first defendant impugned the decree and judgment of the trial Court in A.S. No. 5/90 on the file of the District Court, Pudukottai. The District Judge, more or less, reproducing the judgment of the trial court, in some other forms, confirmed the findings of the trial court concurring with all the findings, thereby dismissed the appeal on 13.11.1991.

7. The first defendant, though lost in both the Courts, having failed in his defence, had questioned the judgment of the courts below in this appeal, on the following substantial question of law which reads:-

"Whether the courts below are right in accepting the claim of the plaintiff to the share of Natesan who died intestate in preference to appellant over the suit property, in the light of Section 6 and 8 of Hindu Succession Act, 1956?"

8. Heard the learned counsel for the appellant, Mr. S. Vijayakumar and the learned counsel for the respondents, Mr. S. Sundaresan.

9. The learned counsel for the appellant argues, that both the courts below have erred in placing reliance upon an unregistered release deed (Ex.A1), which is not even proved and therefore, on the question of law, namely the admissibility of the document in evidence, to prove the title, this Court should decide the case, if necessary even reassessing the evidence, since according to him, the findings of the courts below are perverse in nature. He has further argued, that the substantial question of law viz., inheritance was also not properly appreciated and analysed by the courts below and the error committed on question of law should be set right, by the interference of this Court.

10. The learned counsel for the respondents, who is supporting the findings of the courts below, would contend, that the claim of the plaintiffs was not purely based on release deed alone, whereas the case is based upon a family arrangement also, which is well established, accepted by the courts below, without committing any error and in this view according to him, no interference is called for, the fact being no substantial question of law is involved

11. From the reading of the judgments rendered by the courts below, preceded by the pleadings and evidence, as well as the admitted position, I feel that the courts below have not properly appreciated the question of law, in this case and in fact, committed error, infringing the law itself, thereby vested right in favour of the plaintiffs, which they are not entitled. In this view, to appreciate the facts in issue, as well as the question of law, we have to see the origin of the property, and how it had devolved upon the heirs of the original owner.

12. The admitted position is, that the suit property originally belonged to one Subramania Pillai, who had five sons viz., Manickam Pillai, Sivanandam Pillai, Natesa Pillai, Shanmuga Pillai and Singamuthu Pillai, the first defendant/ appellant herein. The first plaintiff is the son of Shanmuga Pillai and the second plaintiff is the wife of Shanmuga Pillai i.e. the mother of the first plaintiff. It is also an admitted fact, that Manickam Pillai & Sivanandam Pillai died long before

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the advent of Hindu Succession Act. Therefore, according to the plaintiffs, the remaining three sons viz., Natesa Pillai, Shanmuga Pillai, Singamuthu Pillai inherited the suit property by survivorship and they were enjoying as coparceners, which is not disputed by the first defendant. It appears Shanmugapillai died elsewhere in the year 1969 or so, leaving the plaintiffs as his legal heirs. Natesa Pillai died in or about 1975 without any issue. As far as the above facts are concerned, I find no loggerhead between the parties.

13. The first defendant being one of the sons of Subramania Pillai, who succeeded the suit property by suvivorship, is entitled to 1/3 share; could not be disputed. The plaintiffs claimed that the first defendant had released his share in the suit property in favour of his brothers viz. Natesa Pillai and Shanmuga Pillai, thereby he has to be excluded from inheritance or claiming right over the suit property. Then they claimed, that since Natesa Pillai died without any issue, they have inherited the share of Natesa Pillai also, thus becoming the absolute owner of the suit property. It is not known, how the plaintiffs alone could inherit the share of Natesa Pillai, even assuming that Singamuthu, released his share in the suit property in favour of his two brothers. The first defendant being the brother of Natesa Pillai, would be entitled to a share in the properties left by his brother, under Hindu Law. It is not the case of the plaintiffs, that the first defendant relinquished his future interest also, in the suit property. In this view, assuming that the release deed is true, Singamuthu Pillai would be entitled, to a share in the properties left by Natesa Pillai, including in the alleged share released by him; it is not the case of the plaintiffs that Natesa Pillai died testate, under which they inherited the share of Natesa Pillai. The position being so, it is not known, how the plaintiffs have claimed, that they are exclusively entitled to the suit house, as surviving heirs, each taking 1/8 and 7/8th share as it was ancestral joint family property.

14. Natesa Pillai died in the year 1975. The suit was filed in the year 1987. Since the date of death of Natesa Pillai is not given, on the basis of the ouster and adverse possession also, it may not be possible, for the plaintiffs to claim absolute title. In fact, in paragraph 3 of the plaint, it is alleged that Singamuthu Pillai having gone out of the family, by the reason of the family arrangement and remained ousted from the house, without any right, the plaintiffs have acquired title and interest in the suit house. There also, it is not case of the plaintiffs that Singamuthu lost the inheritance, in the share of Natesa Pillai by some means known to law. Therefore, as rightly contended by the learned counsel for the appellant, the courts below have not properly approached the case, and applied the correct law in this case, while deciding the dispute between the parties.

15. The substantial question of law is whether the acceptance of the plaintiffs'' claim to the share of Natesa Pillai, who died intestate is correct in view of Sections 6 & 8 of the Hindu Succession Act, 1956.

16. Section 6 of the Act contemplates devolution of interest in co-parcenary property and Section 8 contemplates general rules of succession in the case of

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males. The parties are governed by the Hindu Succession Act, 1956, no dispute. The suit property was the co-parcenary property of the first defendant and his brothers is also an admitted fact. It is also an admitted fact that Natesa Pillai had 1/3 share in the suit property. He died intestate. Therefore, Section 8 of the Act comes into operation. As per the evidence available on record, Natesa Pillai has not left any issue and it is not known whether his wife is alive or not. Since it is said Natesa Pillai has no heirs, probably first class heirs, the plaintiffs claim right over the share of Natesa Pillai also, and this inheritance must be only u/s 8 of the Hindu Succession Act. The first plaintiff being the son of Natesa Pillai''s brother, the second plaintiff being the wife of Natesa Pillai''s brother, or widow of the brother, they will not come within the meaning of the heirs specified in Class-I of the schedule. If at all they should come under the second category viz., Class-II heirs. If there is no heir of class-1, then the heirs being the relatives, specified in Clase-II of the schedule, shall inherit the properties as per the entries. Only in schedule II, brother, brother''s son and brother''s widow are classified as the heirs, entitled to inherit the property of male, who died intestate, having no class-I heirs. Here also, the brother comes in the second entry, whereas the brother''s son comes in the 4th entry and brother''s widow comes in the 6th entry. The property of intestate shall be divided between the heirs specified in class-II of the schedule, so that they share equally also. The admitted legal position being so, it is not known, how the plaintiffs had claimed the share of Natesa Pillai, as if they have inherited the same or devolved upon them.

17. The courts below have not properly concentrated on this point of law and therefore, in my opinion, erred in concluding that Natasa Pillai''s share should go to the plaintiffs, forgetting the legal heir viz., the first defendant, admitted brother of Natesa Pillai. The alleged released deed, even if it is true, of the year 1945, will not deprive the right of inheritance, which opened in 1975 i.e. on the death of Natesa Pillai. If the release deed should be construed as genuine one, then Natesapillai and Shanmuga Pillai would have inherited the properties in equal moity. The share of Natesa Pillai should devolve upon the brother viz., Singamuthu and not on the plaintiffs, who are in the subsequent entries, in Shcedule II. In this view of the matter, I am of the firm view, that the courts below have not properly considered the case of the parties and erred in granting a decree, in favour of the plaintiffs, as if they are absolute owners, which could not have the sanction of this Court.

18. The learned counsel for the appellant argues that the suit is purely based on Ex.A1, in order to oust the first defendant/appellant, from claiming share and since the documents itself is not proved and inadmissible, the claim of the plaintiffs'' share could be negatived. Admittedly, Ex.A1 is an unregistered document, dealing with immovable property, having value more than Rs.100/-. Therefore, in the ordinary course, it requires not only stamp duty, but also the registration. The courts below have held that this document is admissible, even for want of registration, for collateral purpose viz., to decide the possession,

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which appears to be incorrect, in view of the discussion in the judgment itself, as well as in view of the claim made by the plaintiffs. It is not the case of the plaintiffs, that there was a family arrangement and the same was reduced into writing, and at later point of time, to have some record, the above transaction was recorded.

19. Paragraph-2 of the plaint reads, that in or about middle of the year 1945, Singamuthu received a sum of Rs. 400/- in lieu of his share and got out of the family releasing his share, thereby implying, only under this document, he has released his share, in the suit property. The same position is reiterated in the latter portion of the plaint also, that in pursuance of the said family arrangement or release deed, Natesa Pillai and the plaintiffs'' predecessor in title were enjoying the property. Therefore, it is clear, that the claim is based upon the release deed. In this view of the matter, it cannot be said at present that Ex.A1, release deed is exhibited, purely for collateral purpose and in fact it is relied on by the plaintiffs, for establishing the extinguishment of the first defendant''s right, as well as the investment of the right, in favour of his brothers.

20. In Ruckmangathan Vs. Ramalingam, , this court has held, that when ownership could not be established based on unregistered sale deed, possession, which is also a part of the transaction, cannot be construed as collateral purpose. In the case involved in the above decision, it seems the genuineness of the document relied on for collateral purpose was disputed. Therefore, it is observed in the said ruling, that if the genuineness of a document is questioned, the execution of document itself has to be proved, and such execution cannot be considered as collateral purpose. It is also stated in the above ruling that -

"Unregistered instruments, such as partition deed, sale deed, receipt, etc., which required to be registered may be admitted and relied on for the purpose of proving the disruption of status and division of property, separate possession and separate dealings by the parties. Though not admissible to prove title to the immovable properties in question, they could be referred for the collateral purpose of showing that the parties were dealing with the properties in their separate possession on the footing that there had been a partition between the members of the family."

21. In this case, according to the plaintiffs the right of the first defendant passed on to the brothers, only on the basis of the release deed and if the said release deed could not be proved, making use of the said document for the purpose of possession, cannot be termed or described as collateral purpose. In this view, I should conclude, that Ex.A1 is inadmissible in evidence, for want of registration and proper stamp duty and on the basis of Ex.A1, the plaintiff cannot succeed.

22. In Ganpat Mal Dhariwal Vs. Sukhraj and Another, , it is held as follows:

"The legal position regarding collateral purpose is that this expression does not permit the party to establish by the document of relinquishment that it created or declared or assigned or extinquished any right in the immovable property."

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23. The legal position being so, the courts below are not entitled to read this document, as evidence, in order to declare the title of the plaintiffs. In fact as seen from the judgments of the courts below, it is clear that the document has been read by the courts, not only for limited purpose viz., the so called collateral purpose, but for the extensive purpose of recognising the rights of the parties including, to exclude the right of the first defendant. In this view of the matter, I conclude that the courts below have erred in placing reliance upon Ex.A1, an unregistered release deed, to prove the title of the plaintiffs.

24. The learned counsel for the appellant argues that the execution of Ex.A1, since not admitted, it should be proved by adducing satisfactory evidence, for which there is no evidence, but unfortunately, the courts below had come to a conclusion, as if execution is proved, which is incorrect.

25. From the reading of Ex.A1, it is not known, when this document was executed. Plaint is also silent regarding the date of execution of this release deed, though, it reads in or about middle of the year 1945, there was a family arrangement. It is also not the case of the plaintiffs, that the first defendant executed a release deed in favour of his two other surviving brothers. The document also does not indicate on which date, this was written. It seems stamps were purchased on 12.6.45, but there is no indication about the date of actual execution of the document. Ex.A1 also does not read, that the past transaction was recorded under the document. Further as seen from the appendix of the plaint, this document was also not produced, at the time of the filing of the plaint, whereas it was produced and marked through P.W.1, when he was in the box on 18.7.1989. In view of the absence of specific plea, regarding the actual execution of the document, it is incumbent on the plaintiffs to prove the actual execution namely, the first defendant signed in the document, thereby released his share in favour of his two brothers. To prove the execution of Ex.A1, neither the scribe nor the attesters were examined. From this document, it is also not known, who has written this document. Further the description of property also incomplete, except the street name, which appears to be written subsequently. There is no indication that this document relates the suit house.

26. P.W.2 would state that she knew about Ex.A1, but unable to say, who had written this document. Two names do find place in Ex.A1, as they have attested, in each page and they are Nalla servai and Kalyani Pillai. P.W.2 would state that this document was attested by Nalla Servai and Kalyani Pillai and they are not alive. P.W.2 has not spoken about the actual payment of Rs. 400/-. She said, in her presence, a sum of Rs. 100/- was paid postponing the payment. Ex.A1 recites, in order to release the share of the first defendant, the amount fixed was Rs.400/- and a sum of Rs. 100/- paid on the same date and the balance of amount should be paid at the time of the registration, thereby indicating, further that the parties have contemplated registration also. It is not the case of the plaintiffs or P.W.2 that subsequently a sum of Rs. 300/- was paid in pursuance of the release deed. Therefore, if at all, it could be said there was an attempt to

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take release deed from the first defendant, but the same was not fructified and that is why the document itself is incomplete and that is why it is not registered, despite the fact, the parties have contemplated registration. P.W.1 has not spoken about the release deed or its execution, whereas he would speak about the discharge of the debts. Thus, we are left with nil evidence, to prove the execution of Ex.A1.

27. Unfortunately, both the courts below have committed a blunder, in concluding that this document was proved as if it was executed by the first defendant, that too, comparing the alleged signatures of the first defendant in Ex.A1 with his admitted signatures in the court records. True, the Indian Evidence Act gives ample power to the Court to compare the signatures of the parties, when disputed and in my considered opinion, the same would not be safe always, that too, when the contemporaneous documents are not available to compare the signature. As per the case of the plaintiffs, Ex.A1 might have came in to existence elsewhere in the year 1945. The signature of the first defendant of the year 1945 is not available for comparison. In the written statement, the first defendant had signed on 25.11.87 i.e. after 32 years. It is the common knowledge that the signature of an individual, will vary according to the age, years and other attending circumstances. Therefore, it may not be correct to say that a person, who signed in the year 1945 would be signing in the same manner, in the year 1987. In this view alone, I said comparison of the signatures may not be safe, in the absence of contemporaneous signatures. Therefore, the courts below had committed an error, in comparing the signatures and coming to the conclusion, that the first defendant might have signed in Ex.A1. On comparison of the signatures, it is seen that the different inks were used for writing the body of the document and for signing the document. Under the above circumstances, I am unable to conclude that the first defendant might have signed in the document, accepting the release or acknowledging the release. When this document was put to D.W.1, he has categorically denied his signature, saying that this document does not contain his signature. The position being so, unfortunately, on the basis of surmises and conjectures, drawing presumption, in between the lines, the courts below have come to a conclusion, as if Ex.A1 was executed by the first defendant, which is not acceptable.

28. The family arrangement is falsified even by the subsequent conduct of the parties, which could be seen from the documents produced by the defendant. It is the specific case of the plaintiffs, that in pursuance of the family arrangement, they have discharged the debt, but to prove the same, no document is filed. On the other hand, the first defendant has produced Ex.B1, a discharged mortgage deed executed by Subramania Pillai, Natesa Pillai, Shanmuga Pillai including the first defendant, having the endorsement of discharge, which would prima facie prove, that the debt was not discharged by the plaintiffs or Natesa Pillai exclusively.

29. As seen from Ex.B4, on 6.9.1972, Natesa Pillai and the first defendant, had

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executed a mortgage deed in favour of Ramanatha Ambalam mortgaging the property for a sum of Rs. 1750/-. It seems, the debt is not yet discharged and therefore, registration copy of the document is filed. The courts below have labelled this document, as if not proved or concocted, for the purpose of this case. In the year 1972, even according to the plaintiffs, after the alleged family arrangement in 1945, there was no dispute between the parties and Natesa Pilai would not have acted against his own interest. The position being so, as proved by a registered document, whether the transaction is genuine or not, we are not very much concerned in this case, the brothers have jointly mortgaged the property, thereby indicating that Natesa Pillai recognised the right of the first defendant, in the suit property. If there had been a release and the first defendant had released his share, in the suit property under the family arrangement, definitely the brother would not have joined together and executed a mortgage deed. In the same manner, as seen from Exs.A7 to A13, house tax was also paid by the first defendant as spoken by D.W.1. When a portion of the suit property was sold in the court auction, as evidenced by Ex.B.14, the same was restored to the family.

30. The above attending circumstances, after the so called family arrangement, are proof sufficient to conclude that the family arrangement pleaded by the plaintiff must be incorrect. The above unavoidable circumstances, if read with the failure on the part of the plaintiffs, to prove the family arrangement as well as Ex.A1, should prompt the court concerned, to conclude unhesitatingly that the plaintiffs are not entitled to have absolute right over the suit property and if at all they can have the right of their predecessor in interest viz., Shanmuga Pillai alone, as his heirs and nothing more. On the basis of the ouster also by proving the continuous period of possession, no claim is made out. The defendant, has exercised the right of ownership over the suit property under Ex.B4 as well as by payment of tax, then initiated steps to change the property register in his name, applying to the municiplaity, etc., which would indicate, that there was no ouster to the knowledge of the first defendant by the plaintiffs, though they claim to be in possession of the property. Assuming that they are in possession, their possession could be recognised and called as that of co owner''s possession, which should represent the other''s possession also, unless ouster is pleaded and proved or extinguishment of the other co-owners is established, which are absent in this case.

31. Both the courts below without considering the above facts in proper perspective and analysing the case in a short campus, confining to the plaintiffs'' case alone, committed error not only on facts, but also on law, thereby rendered a perverse judgment, which is required to be set aside, as contended by the learned counsel for the appellant. This point is answered accordingly.

32. In the result, the appeal is allowed, setting aside the decree and judgment of the courts below ordering dismissal of the suit. Considering the relationship between the parties and other attending circumstances, the parties are directed

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to bear their respective costs throughout.

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