

Marappan and Others Vs. T.K. Ramasamy

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Court : Chennai

Decided On : Nov-01-2012

Reported in : 2013(1)LW255; 2013(1)MWN(Civil)98

Judge : P.R. Shivakumar

Appeal No. : S.A. No.317 of 2007 & M.P.No.1 of 2007

Appellant : Marappan and Others

Respondent : T.K. Ramasamy

Advocate for Pet/Ap. : For the Petitioners: N. Manoharan, Advocate. For the Respondent: P.M. Duraisamy, Advocate.

Judgement :

(Prayer: Second Appeal filed under Section 100 of Civil Procedure Code to set aside the Judgment and decree of the Subordinate Judge, Bhavani dated 29.03.2006 made in A.S. No.20 of 2005 confirming the judgment and decree of the Additional District Munsiff, Bhavani dated 09.08.2004 made in O.S.No.386 of 2004.)

1. The defendants in the original suit are the appellants herein. Plaintiff in the original suit is the respondent herein. The respondent herein filed O.S.No.386 of 2004 on the file of the Additional District Munsif, Bhavani against the appellants herein/defendants for a decree directing them to pay a sum of Rs.70,000/- as

damages for the damage caused to the trees in the suit properties with an interest on the said amount from the date of plaint till realisation and also for cost. The suit was decreed as prayed for with cost by the trial court and the appeal filed by the appellants herein/defendants in A.S.No.20/2005 on the file of Subordinate Judge, Bhavani was dismissed. As against the decree of the said appellate court by which the decree passed by the trial court stood confirmed, the appellants herein have come forward with the present second appeal. For the sake of convenience, the parties are referred to in accordance with their rankings in the original suit.

2. The plaintiff T.K.Ramasamy is the son of Tmt.Muthayammal. The first defendant Marappan is the son-in-law of the said Muthayammal. The second defendant Chinnakannan @ Annamalai is the brother of the first defendant. Third defendant Selvakumar and the fourth defendant Sengottuvelavan, according to the plaint averments, are the close relatives of Marappan. An extent of 3.25 acres comprised in Survey No.558 within the specified boundaries morefully described in the plaint schedule originally belonged to the above said Muthayammal. Claiming that the said Muthayammal executed a gift settlement deed in respect of the said suit property and another property in favour of plaintiff T.K.Ramasamy reserving a life estate for her in the suit property alone; that thus the plaintiff T.K.Ramasamy became entitled to the suit property and the trees grown therein right from 26.07.1979, the date of execution of the gift settlement deed; that the defendants, along with their henchmen numbering 50, cut sixty Palmyra trees aged 50 years, 20 neem trees aged 30 years and 12 vaagai trees aged 35 years from the suit property on 26.12.2003, removed them by two lorries bearing Regn.Nos.TN-28 Z-1441 and TCC 4363 to Anthiyur and sold them to brick chambers belonging to one Dharmalingam; that thus the defendants caused damage to the tune of Rs.1,00,000/-, the plaintiff had filed the suit for the above said reliefs. It had also been contended in the plaint that the trees were cut and removed by the defendants with the assistance of Kaundapadi Police and hence when a complaint was lodged by the plaintiff, no action was taken against him by the Kaundapadi police. It was also the contention of the plaintiff that since the further complaint to the higher police officials and the district collector proved ineffective, he had to file a private complaint before the Judicial Magistrate, Bhavani on 09.01.2004. Based on the said allegations, the plaintiff had prayed for a decree against the

defendants directing them to repay a sum of Rs.70,000/- with subsequent interest at the rate of 12%, restricting his claim to the said amount even though he had assessed the damage allegedly caused by the defendants at Rs.1,00,000/-.

3. The suit was resisted by the defendants on the basis of the written statement and additional written statement filed by the first defendant Marappan, which were adopted by the defendants 2 to 4. Besides denying the plaint averments that there were 60 Palymyra trees aged 50 years, 20 neem trees aged 30 years and 12 vaagai trees aged 35 years on the date of alleged occurrence as false, the defendants had contended that since Muthayammal retained a right to enjoy the suit property till her lifetime, she continued to be in possession and enjoyment of the suit property and that as such the document dated 26.07.1979 relied on by the plaintiff should be deemed to be a will and not a settlement. It was also the contention of the defendants that the said Muthayammal inducted the first defendant as a cultivating tenant in respect of the suit land under a lease deed bearing document No.3592/2003 dated 30.12.2003 and that subsequently, Muthayammal executed a will on 07.05.2004 bequeathing the suit property in favour of the first defendant and thus the document relied on by the plaintiff stood revoked by the said will. The defendants had also denied the plaint averments that they cut and removed the trees worth Rs.1,00,000/- from the suit properties. They had taken a stand that no tree was cut and removed by any one of the defendants. Based on the above said averments, the defendants had prayed for the dismissal of the suit.

4. " 1) Whether the defendants cut the trees standing in the suit land?; 2) Whether the plaintiff is entitled to a decree as prayed for? And 3) to what other relief the plaintiff is entitled to?" are the three issues framed by the trial court based on which the parties went for trial.

5. In the trial, four witnesses were examined as PWs.1 to 4 and seven documents were marked as Exs.A1 to A4 on the side of the plaintiff. One witness was examined as DW.1 and two documents were marked as Exs.B1 and B2 on the side of the defendants. Six documents were marked as court documents with exhibit numbers C1 to C6. At the conclusion of trial, the learned trial judge at the

conclusion of trial, on an appreciation of evidence based on the points raised by the counsel appearing for the parties in the arguments advanced by them, came to the conclusion that the trees that stood in the suit property had been cut and removed by the defendants as claimed by the plaintiff and that hence the plaintiff was entitled to the relief of damages. The learned trial judge also accepted the case of the plaintiff regarding the value of the trees cut and removed and accordingly decreed the suit as prayed for by directing the defendants to pay a sum of Rs.70,000/- as damages with interest on the said amount from the date of plaint till realization at the rate of 12% per annum.

6. The said judgment and decree of the trial court dated 09.08.2004 was challenged by the defendants before the lower appellate court, namely the Court of Subordinate Judge, Bhavani in A.S.No.20/2005. The learned first appellate judge also concurred with the findings of the trial court, confirmed the decree passed by the trial court and dismissed the appeal by judgment and decree dated 29.03.2006. The said decree of the lower appellate court by which the decree passed by the trial court was confirmed, is challenged in the present second appeal. At the time of admission of the second appeal, the following questions were framed as substantial questions of law:

1. Whether the plaintiff is entitled to maintain the suit on the basis of the right conferred under the document dated 26.07.1979 (Ex.A1) during the life time of his mother, particularly when the plaintiff will get the property only after the life time of her mother Tmt.Muthayammal as per the recitals in the document Ex.A1?

2. Whether the courts below are correct in law in decreeing the suit for damages in the absence of any legal evidence to establish the existence of the trees, the factum of damage caused and the value of the trees cut and removed by the defendants and further report and plan filed by the Advocate Commissioner is of no value to quantify the damages?

7. The arguments advanced by Mr.N.Manokaran, learned counsel for the appellants and by Mr.P.M.Duraisamy, learned counsel for the respondent were heard. The judgments of the courts below, pleadings of the parties and other documents were also perused.

8. Of course this second appeal happened to be one filed against the appellate court's decree by which the trial court's decree was confirmed. Learned counsel for the appellants vehemently contended that both the courts below committed a grave error in wrongly casting the burden of proof on the defendants and holding that the defendants had not proved the negative, namely that the trees were not cut by the defendants and resultantly decreed the suit as prayed for. According to the learned counsel for the appellants/defendants, the said approach made by the courts below was totally erroneous and against law. It is also the contention of the appellants/defendants that since Muthayammal had retained a right to enjoy the property till her life time, the present suit filed by the plaintiff during the life time of Muthayammal is not maintainable and that the same was overlooked by the courts below. It is also the contention of the learned counsel for the appellants/defendants that the plaintiff's case that the defendants had cut and removed the trees should have been held improbable and the plaintiff should have been non-suited for the reliefs sought for.

9. Per contra, learned counsel for the respondent/plaintiff would contend that since the first defendant claimed that he was a cultivating tenant under Muthayammal, the same should be an admission that the defendants had access to the suit property and that under such circumstances, the defendants failed to prove that no trees which stood in the suit property had been cut and removed or that the trees that stood in the suit property had been cut and removed by any other person. It is his further contention that the courts below had rightly cast the burden on the defendants in this regard and on probabilities also the courts below arrived at a concurrent finding of fact that the trees that stood in the suit properties were cut and removed by the defendants and that hence the second appellate court would not be justified in interfering with the concurrent finding of facts recorded by the lower appellate court.

10. This court paid its anxious consideration to the above said submissions made on both sides.

11. Admittedly, Muthayammal was the original owner of the suit land. It is also not in dispute that under a settlement deed dated 26.07.1979, a certified copy of which

has been produced and marked as Ex.A1, the said Muthayammal settled the said property on the plaintiff, reserving a life estate for her to enjoy the property without the power of alienation till her death. Though the execution of the said settlement deed registered as document No.3504/1979 in the office of the District Registrar, Erode is not disputed by the defendants, they made an attempt to contend that since possession of the suit property was not delivered immediately to settlee under the said document and the settlor had retained a right to enjoy the property till her life time, the said document should be deemed to be a Will and not a gift settlement. Both the courts below, on proper interpretation of the said document, rejected the said contention of the defendants and held that the vesting of title under the said document had not been postponed and on the other hand the enjoyment of the property alone was postponed till the death of Muthayammal, who retained a life interest imposing a restriction on her right that she would not have any right of alienation. The courts below have rightly held that if at all a document is to be construed to be a Will, it should contain a recital that the same would take effect only on the date of the person executing that document and it would also invariably contain a recital that the person executing the document could at any time cancel or revoke the same during his lifetime. It is also pertinent to note that in the said document clear recitals have been made to the effect that the executor of the document did not retain the power of revoking or modifying the same. It is also pertinent to note that an earlier will executed by Muthayammal had been cancelled under the original of Ex.A1 and the said settlement deed was executed knowing fully well the nature of a Will and the nature of a gift settlement deed. Therefore, the attempt made by the defendants to contend that the document dated 26.07.1979 under which the plaintiff claims title is only a Will and is not a settlement must necessarily fail. Both the courts below have arrived at a correct conclusion in this regard.

12. Though the original of Ex.A1 cannot be deemed to be a Will and it is nevertheless a gift settlement deed, that alone shall not be sufficient to grant the relief sought for by the plaintiff in this case. The plaintiff has prayed for a decree directing the defendants to pay a sum of Rs.70,000/- as damages based on his plea that the defendants cut and removed a number of trees which stood in the suit property. Though the defendants might have taken a stand that the first

defendant had been inducted as a cultivating tenant by Muthayammal and thereby the defendants admitted that the first defendant was in possession of the suit property as on the date of filing of the suit, that alone shall not be enough to show that on the alleged date of occurrence, namely 26.12.2003 there were trees in the suit property and they were cut and removed by the defendants. Both the courts below failed to note the fact that the defendants did not take a plea that even prior to the date of alleged occurrence, namely 26.12.2003 on which date the trees were allegedly cut and removed the first defendant was in possession of the suit property as cultivating tenant and on the other hand, it was the contention of the defendants that only on 30.12.2003, the first defendant was inducted by Muthayammal as a cultivating tenant. Admittedly, under the original of Ex.A1-settlement deed, the settlor Muthayammal reserved a right to enjoy the income from the suit property till her life time. As such, as rightly contended by the defendants, Muthayammal had a right to enjoy the suit property either by personal cultivation or by leasing out the same. Whether such a lease shall be binding on the plaintiff after the life estate of Muthayammal comes to an end on her death, is not a question germane for the consideration in this case. Suffice to state that the right of Muthayammal to enjoy the suit property and its income till her life time is an admitted fact. Hence, the plaintiff, who contends that on a particular day, namely on 26.12.2003, the trees that were standing in the suit property were cut and removed by the defendants, especially in the absence of any kind of admission made by the defendants should prove the same by sufficient and reliable evidence. The stand taken by the defendants that the first defendant was inducted as a cultivating tenant by Muthayammal on 30.12.2003 had been wrongly interpreted by the courts below as an admission that the first defendant was in possession of the suit property on the date of alleged occurrence, namely 26.12.2003.

13. In fact, the courts below seem to have avoided using any expression that the possession of the suit property was with the first defendant on the date of the alleged occurrence, but had chosen to state that since the defendant's claim that the first defendant was inducted as a cultivating tenant and he had also claimed that a subsequent will had been executed by Muthayammal bequeathing the suit property to the first defendant, the first defendant should be held to be a person

who had access to the suit property. Simply because the first defendant, being the son-in-law of Muthayammal, claimed to have become a cultivating tenant subsequent to the date on which the trees were allegedly cut and removed and he had also propounded a subsequent will and thus he could have had access to the suit property, it cannot be held that it was the first defendant or any of the defendants who entered the suit property on 26.12.2003, cut the trees and removed them.

14. When the defendants had taken a stand that the first defendant was inducted as a cultivating tenant only subsequent to the date of alleged cutting of the trees, the legal possession would have been with Muthayammal and Muthayammal was the competent person to say what were the trees that stood on the suit land and what happened to those trees. Muthayammal had not been made a party to the suit and she was also not examined as a witness on the side of the plaintiff. On the other hand, the courts below have found fault with the defendants for not examining the said Muthayammal to prove that either there were no trees or that the trees were not cut by the defendants. The very approach made by the courts below is based on surmise exhibiting bias. The plaintiff, who approached the court with the suit for recovery of damages on the ground that the trees that stood in the suit property were cut and removed by the defendants should have proved the following aspects:- 1) that there were actually such trees as claimed by the plaintiff; and 2) that the defendants were the persons who cut and removed the trees.

15. So far as the first question is concerned, the case of the plaintiff mainly relies on the oral testimony of plaintiff side witnesses and Ex.A1. In Ex.A1 there is no specific recital mentioning the number, age and names of trees. It has simply recited "kh tif ku tif" meaning that standing trees if any. Interpreting the said recital, the courts below have come to the conclusion that unless there were trees as claimed by the plaintiff, such recital would not have been incorporated in the settlement deed. The same is not correct. It is the usual ritualistic language used by the document writers while writing documents under which immovable properties, especially agricultural lands are sought to be transferred. Even in the absence of such a recital, the same would not mean absence of any tree. As such,

much importance need not be given to the above said recital found in Ex.A1.

16. The other evidence available on the side of the plaintiff to prove the said case of the plaintiff are the testimonies of PWs.1 to 4 and Exs.A2 to A7. Apart from those documents, the trial court and the appellate court seem to have very much relied on the documents produced as Exs.C1 to C6. Exs.C3 to C6 should not have been marked as court documents. Since they were produced by a witness examined on the side of the plaintiff as PW.4, they ought to have been marked either as plaintiff side documents or as the documents of witness with the marking of 'x' series. The document marked as Ex.C3 shows that joint patta had been issued in the name of Muthayammal, the plaintiff and the first defendant's wife Paavathaal. The same will not in any way further the case of the plaintiff. The document marked as Ex.C4 is the FMB of Survey No.770. The same does not give any proof of existence of trees. The document marked as Ex.C5 shows Muthayammal to be the pattadar for sub divisions 1 and 2 of new Survey No.770, which are noted as field pond and vaary (epytpay; Fl;ila[k; thhpa[k;). The only document that shows that there are some trees in Survey Nos.770/1 and 2 is the document marked as Ex.C6. In the said document, the crops raised have been shown as follows:

" Coconut, pomegranate, Maize and Gingner "

None of the above said documents shows the existence of Palmyra trees, Neem trees or Vaagai trees. Therefore, the said documents will not render any help to the plaintiff to prove his case that such trees were there in the suit properties and they were cut and removed by the defendants on 26.12.2003.

17. The courts below have very much relied on the report and the plan of the Advocate Commissioner appointed by the trial court which were marked as Exs.C1 and C2. It is pertinent to note that Exs.C1 and C2 do not refer to the survey number of field which was inspected by the Advocate Commissioner. The Commissioner seems to have made the following observations in his report:-

1) 52 Palmyra trees had been cut leaving a stem of 2 to 3 feet from ground level;

2) 7 Vaagai trees, 5 neem trees, 5 Purasai trees, one Vela tree, one Konapulian tree, one Tamarind tree, one white vela tree and, one karuvela tree had been cut leaving a stem of 2 or 2 = feet from the ground level.

It is pertinent to note that the plaint contains averment that 60 Palmyra trees, 20 neem trees and 12 vaagai trees had been cut. The class of trees, number of trees in each class found noted in Ex.C1 do not tally with the figures furnished in the plaint.

18. The defendants had also taken a stand that the Commissioner did not visit the suit property. It is not in dispute that the suit property is in the possession of Muthayammal through the first defendant. As such without their knowledge, the suit property could not have been inspected so extensively by the Advocate Commissioner. Admittedly an ex-parte commissioner was appointed. When commissioners are appointed ex-parte to inspect the suit properties, the order shall incorporate a direction to give notice to the opposite party and then inspect the suit property, so that the opposite party can also give instructions and raise objections regarding the manner in which the inspection is conducted. Curiously in this case, no such notice was given to the defendants. In the typed report a sentence in writing has been added to the effect that since none of the defendants were available in the suit property at the time of commissioner's inspection, the commissioner could not give notice to them.

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It is highly surprising as to how the Advocate-Commissioner expected the defendants to be present in the suit property, an agricultural land, at the time of inspection of the commissioner when no notice was given to them.

19. It is also pertinent to note that one Mr.P.R.Senthil Kumar, advocate was the Advocate-Commissioner appointed by the trial court. It was also contended on behalf of the defendants that the said advocate was one of the counsel, who appeared for the plaintiff in another case and that the ex-parte order of appointment of Commissioner was used to bring into existence a biased and incorrect report. Learned counsel for the respondent herein/plaintiff argued that the

said advocate was a junior counsel to the counsel appearing for the plaintiff in yet another case and the same would not vitiate his report or make his report a biased one. This court is unable to accept the above said contention made by the learned counsel for the respondent/ plaintiff. When the advocate was named by the court to be a commissioner, he should have informed the court that in yet another case he was a counsel on record for the party who had filed the petition for appointment of an advocate-commissioner for spot inspection. The said advocate-commissioner Mr.P.R.Senthil Kumar has been examined as a witness on the side of the plaintiff and he figured as PW.3. PW.3, in his evidence, has admitted that he appeared for the plaintiff in O.S.No.11 of 2001 and in the appeal arising from the said suit. But still PW.1 would deny the same. When the advocate was very much aware of the fact that he had appeared for the plaintiff in another case, he ought to have informed the said fact to the court and requested appointment of another advocate as commissioner. The fact that PW.3 did not do so and at the same time filed a report and plan without giving a notice to the appellants herein/defendants before making inspection of the suit property, will show that his report is not free from bias. Even after the said fact that the advocate-commissioner was one of the counsel who conducted the case for the plaintiff in another matter was brought to the notice of the trial court and a specific suggestion was put to PW.1 that the property referred to in the commissioner's report was not the suit property, the plaintiff had not chosen to seek the appointment of a neutral advocate as commissioner at least to show that the property visited by PW.3 was the suit property. Though the plaintiff has failed to remove the stint of bias in the report of the advocate-commissioner, the courts below have chosen to wrongly find fault with the defendants by making an observation that the defendants had failed to seek appointment of a new advocate-commissioner or for re-issuance of the commission warrant.

20. As pointed out supra, the very approach made by the courts below seems to be biased. There is nothing on record to show how the advocate-commissioner was able to identify the stems of the trees to be of the particular types of trees. If all these aspects had been taken into consideration, the courts below ought to have held that Exs.C1 and C2 were not helpful to prove the case of the plaintiff that the trees mentioned in paragraph 7 of the plaint were there in the suit

properties and they had been cut and removed. Even if it is assumed that there were such trees and they had been cut before the advocate-commissioner went for inspection, unless the plaintiff proves that those trees were cut and removed by the defendants, he would not be entitled to the relief of damages sought for. In this regard, apart from the plaintiff who figured as PW.1, one more witness by name K.S.Venkatasamy has been examined as an eye witness for the occurrence. Even the plaintiff, who figured as PW.1 has not come forward with a clear assertion that he saw the defendants cutting and removing the trees. On the other hand, a bald averment has been made in his proof affidavit to the effect that due to recent enmity, the defendants and their henchmen numbering 50 cut the trees on 26.12.2003, took them in two lorries to Anthiyur and sold them in the brick kiln of one Dharmalingam. Nowhere in his evidence he has stated that he actually witnessed the occurrence of the defendants cutting and removing the trees. On the other hand, PW.2 K.S.Venkatasamy has been examined as an eye witness for the said occurrence. It is the evidence of PW.2 that on 26.12.2003 defendants 1 to 3 cut the trees from the suit property and he saw them cutting the trees. It is pertinent to note that PW.2 is none other than the younger brother of the wife of the plaintiff. He is not in a position to state even the approximate extent of the suit property. According to the plaint averments and PW.1's evidence, the defendants, who are 4 in number, along with their henchmen 50 in number, entered the suit properties on 26.12.2003, cut the trees, removed them to Anthiyur and sold them to one Dharmalingam for use in his brick chamber. But PW.2, who is said to be an eye witness simply names the defendants 1 to 3 alone as the persons who cut and removed the trees. It is not his evidence that they were accompanied by 50 others.

21. It is the case of the plaintiff that on 26.12.2003 itself he lodged a complaint on the file of Kaundapadi Police station. It is his further evidence that since no action was taken on his complaint by the police personnel in Kaundapadi police station, he sent complaints to the Superintendent of Police and the District Collector and ultimately preferred a private complaint. Nowhere in the evidence of PW.1, it has been stated that PW.2 Venkatasamy also accompanied him when he lodged a complaint with the police in Kaundapadi Police Station. However, PW.2 would state that when the plaintiff lodged a complaint in the police station he had also accompanied him. It is the evidence of PW.1 that there was no proper action on

this complaint. It is not his case that the police refused to receive the complaint. On the other hand, PW.2 would say that when the plaintiff gave the complaint, the police refused to receive it. It is the further evidence of PW.2 that after the police at Kaundapadi police station refused to receive the complaint, they lodged a complaint with the Dy. Superintendent of Police, Gobichettipalayam and that since no action was taken based on the complaint given to the Dy. Superintendent of Police, he advised the plaintiff to give a fax message to the Superintendent of Police. Ex.A2 has been produced as the copy of the complaint lodged with the police in Kaundapadi Police station. It contains an averment that on 26.12.2003 at about 10.00 hours, the first defendant Marappan and the second defendant Annamalai along with 50 other men came to the suit property armed with saw, axe, crowbar, bill-hook and spears, cut about 60 palmyra trees, neem trees and vaagai trees and took them in two lorries and two tractors. It has also been averred that when he questioned, the defendants 1 and 2 threatened to kill him if he ventured to go near them and hence he had come running to the police station to lodge the complaint. No receipt has been produced to show that such a complaint was given on 26.12.2003. Ex.A3 has been produced as a copy of the complaint sent to the Superintendent of Police, Erode on 26.12.2003 itself. It contains an averment that soon after the occurrence, he rushed to Kaundapadi police station and presented the complaint, but the police refused to issue a receipt for the same. It is quite contrary to the evidence of PW.2 that when the police in Kaundapadi police station failed to receive the complaint they lodged a complaint with the Dy. Superintendent of Police, Gobichettipalayam and since no action was taken, he advised the plaintiff to give a fax message to the Superintendent of Police. On which day such advice was given and on which day such complaint was given to the Superintendent of Police, are not spoken to by PW.2. Ex.A4 is said to be a copy of the complaint sent to the District Collector, Erode. It is similar to the one produced as Ex.A3. Only the address has been changed. What was the necessity to give simultaneous complaints to the Superintendent of Police and also to the District Collector, has not been explained. Ex.A5 is the copy of the private complaint allegedly preferred by the plaintiff on the file of the learned Judicial Magistrate, Bhavani. The contents of the complaint are quite contra to the contents of the earlier documents discussed above. Nowhere in

his evidence or in the documents produced as Exs.A2 to A4, the plaintiff had stated that he informed the police over phone and since no action was taken based on the phone message, he went to the police station in person at 12.30 p.m on the same day and lodged a complaint in writing. The allegation that the police, who received the complaint, refused to issue receipt and later on they failed to take any action are also not found in the said document. It should also be noticed that a gradual improvement has been made by the plaintiff in building the case against the defendants. In Ex.A5, averment has been made to the effect that police officials, namely the Sub-Inspector of Police (woman), Kaundapadi and the Sub-Inspector of Police (man), Kaundapadi, who were shown as accused Nos.7 and 8 were present in the scene of occurrence and that when the plaintiff asked them to prevent the defendants and their men from cutting and removing the trees, they said they would consider if he would lodge a complaint in the police station. The same is a new case developed by the plaintiff.

22. Ex.A6 is the copy of the notice sent by the advocate of Muthayammal on her behalf to the plaintiff stating that the document dated 26.07.1979 was only a Will and not a settlement though it was titled as settlement and that the said document stood cancelled by a subsequent will dated 07.05.2004, a copy of the same has been produced by the defendants as Ex.B1. Copy of the notice for the reply notice dated 31.05.2004 for the said notice has been produced as Ex.A7. The said documents are not going to further the case of the plaintiff in any manner. A kist receipt in the name of Muthayammal has been marked in the trial court as Ex.B2. The lease deed dated 30.12.2003 executed by Muthayammal in favour of the first defendant, certified copy of the judgment in O.S.No.686/2004 on the file of District Munsif Court, Bhavani filed by the first defendant against Muthayammal and the certified copy of the decree in the said suit have been produced as additional documents in the appeal before the appellate court and they were marked as Exs.B3 to B5 by consent of parties. The production of the said documents would show that the first defendant after the filing of the present suit filed a suit against Muthayammal for getting his name registered as a cultivating tenant based on the lease deed dated 30.12.2003 and the said suit was decreed. The same is not going to improve the case of either of the parties. A careful consideration of the above said evidence will show that the plaintiff has miserably failed to prove his

case that the trees mentioned in the complaint were there in the suit property prior to 26.12.2003 and that the defendants cut and removed them on 26.12.2003. The plaintiff has not chosen to examine the alleged Dharmalingam, owner of the brick chamber to whom the trees were allegedly sold. Instead of properly appreciating the evidence adduced on the side of the plaintiff to find out whether the plaintiff was able to prove his case that the trees that stood in the suit property had been cut and removed by the defendants, the courts below have erroneously cast the burden on the defendants, drew adverse inference against them and rendered a perverse finding to the effect that the plaintiff had proved the plaint averments that the defendants along with their henchmen numbering 50, cut sixty Palmyra trees aged 50 years, 20 neem trees aged 30 years and 12 vaagai trees aged 35 years from the suit property on 26.12.2003, removed them by two lorries bearing Regn.Nos.TN-28 Z-1441 and TCC 4363 to Anthiyur and sold them to brick chambers belonging to one Dharmalingam and that thus the defendants caused damage to the tune of Rs.1,00,000/-. The said finding is no doubt perverse and without hesitation, this court holds that such a perverse finding is to be reversed and set aside. Accordingly, this court holds that the plaintiff has not proved the plaint averments that the defendants, along with their henchmen numbering 50, cut sixty Palmyra trees aged 50 years, 20 neem trees aged 30 years and 12 vaagai trees aged 35 years from the suit property on 26.12.2003, removed them by two lorries bearing Regn.Nos.TN-28 Z-1441 and TCC 4363 to Anthiyur and sold them to brick chambers belonging to one Dharmalingam and caused damage to the tune of Rs.1,00,000/-. He shall not be entitled to a decree against the defendants for payment of any amount, much less Rs.70,000/-, as damages.

23. Even if it is assumed that the trees that stood in the suit properties could have been cut and removed, the further question that arises for consideration is whether the plaintiff has got locus standi to seek compensation for such damage, especially without making Muthayammal, who held life estate, as a party to the suit. A life estate holder shall have a right not only to cultivate the land by raising seasonal plants. Whether the life estate holder has got a right to grow trees, cut and sell them is a moot question that can be decided only in the presence of life estate holder as a party to the suit. Whether the defendants had done it on the authority given by the life estate holder Muthayammal is also a pertinent question.

If she had not given such authority Muthayammal will also be an affected person and the suit should have been filed on her behalf also. If at all the trees had been cut and removed by Muthayammal or anybody on her instructions then the plaintiff ought to have proceeded against Muthayammal. As the plaintiff has not done so, this court has to come to the conclusion that the plaintiff must be held to be entitled no relief.

24. Yet another patent defect in the decrees passed by the courts below is that the award of interest at the rate of 12% per annum, even subsequent to the date of decree, is against section 34 of the Civil Procedure Code. Viewed from any angle, the decree of the trial court, which was confirmed by the lower appellate court does not stand the scrutiny of this court and the same is liable to be set aside.

25. In the result, the second appeal is allowed. The decree of the lower appellate court (Court of Subordinate Judge, Bhavani) dated 29.03.2006 made in A.S.No.20 of 2005 confirming the decree passed by the trial court is set aside and the decree of the trial court (First Additional District Munsif Court, Bhavani) dated 09.08.2004 made in O.S.No.386 of 2004 is also set aside. The suit shall stand dismissed with cost throughout. Consequently, the connected M.P.No.1 of 2007 is closed.

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