

IN THE H000001GH COURT OF JUDICATURE AT MADRAS

Dated: 08 - 06 - 2015

Coram

The Hon'ble SMT. JUSTICE PUSHPA SATHYANARAYANA

Second Appeal No. 190 of 2015

1. Saleema Beevi (deceased)
2. M.K. Mustafa .. Appellants/Plaintiff
(second appellant brought on record as
LR of the first appellant vide order dt.
26.02.2015 in M.P. No. 1 of 2011 in SA.SR.25122/09)

vs.

1. A. Jaffer Sait
2. J. Mohammed Zackarial
3. J. Tajudeen
4. J. Mohammed Farook
5. Mrs. Sowdha Beevi
6. Raja Mohammed
7. Nilofer Nisha
8. Baragath Nisha
9. Parveen
10. Jamal Mohammed
11. M.K. Ibrahim .. Respondents/Defendants
(R 11 brought on record as LR of the
deceased sole appellant vide order
dt. 13.03.2015 in M.P. No. 1 of 2015
in SA.SR.25122/09)

Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 26.06.2008 in A.S. No. 521 of 2006 on the file of the Court of VI Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 05.04.2006 made in O.S. No. 3395 of 2000 on the file of the I Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr. S. V. Jayaraman, SC
for Mr. M. Devaraj

For R 1 : Mr. V. Raghavachari
for Mr. R. Dhanasekaran

For RR 2 - 4 & 12 : Mr. V. Raghavachari for
N. Nithianandam

JUDGMENT

The non-suited plaintiff in suit for partition has preferred the instant Second Appeal as against the judgment and decree dated 26.06.2008 passed in A.S. No. 521 of 2006 on the file of the learned VI Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 05.04.2006 in O.S. No. 3395 of 2000 passed by the learned I Assistant Judge, City Civil Court, Chennai.

2. According to the plaintiff, the suit property was owned by her father E.C. Mohammed Abdul Khader, who obtained a portion under the partition deed dated 21.6.1956 and other portions by way of purchase and after his death on 08.01.2000, she became entitled to 1/5th share of the same as per Muslim Law while his other legal heirs are her brothers, viz., defendants 1 and 2. It is alleged that during 1996, when her father suffered sudden paralytic stroke attack and was unconscious, defendants 2 to 5 fraudulently fabricated documents by way of four settlement deeds and obtained his thumb impression. The main grievance of the plaintiff is that the deceased had no intention at any point of time excluding her from inheriting a share in the suit property. The plaintiff, claiming that she is entitled to 1/5th share in the suit property and the rental income and that she is in joint possession along with defendants 1 and 2 in respect of the suit property, filed the suit for division of the suit property by metes and bounds and delivery of possession of her 1/5th share, for appointment of Advocate Commissioner or Receiver to collect the rents and to pay 1/5th share in the rental income from the suit property.

3. The first defendant filed written statement admitting that the plaintiff is entitled to 1/5th share under the Muslim Law of Inheritance. He also admitted the fabrication of documents by the defendants 2 to 5 besides stating that he is also entitled for partition of his 2/5th share and sought to pass a preliminary decree for partition granting 2/5th share to him.

4. Per contra, the second defendant filed written statement adopted by defendants 3 to 5 denying the allegations made by the plaintiff. It is stated that the settlement deeds were not challenged within the period of limitation and they have been acted upon. According to the defendants 2 to 5, the plaintiff is not entitled for any share in the suit property and the suit for partition is not maintainable and sought for dismissal of the suit.

5. Defendants 6 to 11, who are wife, sons and daughters of the first defendant, filed separate written statement to the effect that the original owner E.C. Mohammed Khader was aware of the contents of the four settlement deeds and the four release deeds executed in favour of defendants 2 to 5, for which the first defendant signed as one of the attesting witness. They denied the averment of fabrication of the documents. According to these defendants, E.C. Mohammed Abdul Kader settled the property without any influence

and with full intention and desire in favour of the defendants 2 to 5 and handed over possession of the suit property to them. It is further stated that since E.C. Mohammed Abdul Kader was not the owner of the suit property at the time of his death, there is no cause of action for the suit and hence, the suit for partition is not maintainable. On these grounds, they sought for dismissal of the suit.

6. Before the trial Court, the plaintiff examined herself as P.W.1 besides examining two more witnesses as P.W.2 and P.W.3 and marked as many as thirteen documents, viz., Exs. A.1 to A.13. To nullify the case of the plaintiff, D.W.1 to D.W.6 were examined on the side of the defendants and Exs. B.1 to B.31 were marked.

7. The trial Court / learned I Assistant Judge, City Civil Court, Chennai, after analysing the oral and documentary evidence available on record, by judgment dated 05.04.2006, has come to a resultant conclusion that the plaintiff is not entitled for the relief as prayed for and accordingly, dismissed the Suit. On appeal, the Lower Appellate Court / learned VI Additional Judge, City Civil Court, Chennai, on appreciation of the facts and the materials available thereon, concurred with the finding of the trial Court and dismissed A.S. No. 521 of 2006 by judgment dated 26.06.2008. Feeling aggrieved by the unanimous decision of dismissal of the suit by the Courts below, the plaintiff is before this Court with this Second Appeal.

8. Heard Mr. S.V. Jayaraman, learned Senior Counsel for the appellant / plaintiff and Mr. V. Raghavachari, learned counsel appearing for the first respondent as well as Mr. N. Nithanandam, learned counsel for the respondents 2 to 4 and 11 and perused the records.

9. From the materials available on record, it is seen that by the impugned judgments, the Courts below have held that the deeds of settlements, viz., Exs. A3 to A.6, dated 07.11.1996 are valid. The fight between the sister and brother center around the above said settlement deeds though the suit is filed by the sister for partition of 1/5th share. It is not in dispute that the first defendant is the brother of the plaintiff and he had attested the settlement deeds. However, he had also supported the case of the appellant / plaintiff and claimed 2/5th of his share in the partition. There is no dispute that the suit property belonged to the father Mohammed Abdul Khader, who got the same by virtue of an earlier partition deed dated 21.6.1956 and also by subsequent self-acquisitions. The above settlement deeds, according to the plaintiff, were fraudulently got executed by the defendants 2 to 5 when the settler was not in a sound and disposing state of mind. It is in this background, the deeds of settlements are alleged to have been created by the second defendant to grab the share of the plaintiff and the first defendant. It is also seen that the contesting defendants took a stand by filing written statement that the deeds were perfectly in order and no illegality was attached to that.

10. Before the trial Court, it was contended that the executant was paralytic patient and his mental and physical conditions were not in order. The contesting defendants, though admitted that the executant was paralytic, however, contended that he was in a fit mental condition at the time of execution of the deeds. The trial Court disbelieved the plea of the plaintiff and dismissed the suit. Similar was the result before the Lower Appellate Court also.

11. A perusal of the records placed before this Court would show that the Courts below had thoroughly considered the materials regarding the age and health condition of the deceased executant. The documents were executed in the year 1996 whereas the executant died in the year 2000. There is a challenge by the plaintiff to the validity of the deeds. No doubt, the onus to prove the validity of the deeds of settlements was on the second defendant. When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, misrepresentation and undue influence. But when a person is in a fiduciary relationship with another and the latter is in a position of active confidence, the burden is on the person in a dominating position. In the instant case, it is for the second defendant and his children viz., D.3 to D.5 to prove the absence of fraud, misrepresentation and undue influence and there was a fair play and the transaction is genuine and bona fide.

12. Learned Senior Counsel appearing for the appellant / plaintiff submitted that the defendants 2 to 5 had fabricated the documents dated 07.11.1996 by obtaining the thumb impression from Mohammed Abdul Khader when he was in a state of unconscious mind. Relying on Ex. A.12, Discharge Summary of the executant and the evidence of P.W.2 and P.W.3, learned Senior Counsel contended that the release deeds dated 26.02.1999 were also obtained in the same manner.

13. A mere perusal of the judgments impugned before this Court would show that the Courts below have concurrently found that the executant was conscious on the date of execution of the said documents and the learned trial Judge as well as the Lower Appellate Judge gave a definite finding that they were executed by Mohammed Abdul Khader only in a sound and disposing state of mind. The finding of the Lower Appellate Court also is to the effect that all the procedures were adopted by the office of the Registrar before registering the documents. Moreover, D.W.1 and D.W.6, who were the attesting witnesses, have deposed about the execution of the settlement deeds. D.W.6 also had spoken about the execution of the release deeds. Though D.W.1, who is the brother of plaintiff and the second defendant, attested the settlement deeds, had deposed against Defendants 2 to 5. Therefore, it is clear that though the settlement deeds were executed in 1996 and the release deeds in 1999, they are not without the knowledge of the plaintiff and the first defendant.

14. That apart, it is also seen that the plaintiff also had sent a letter of objection to the Registrar and the same was dismissed. Thereafter, the plaintiff had not taken any steps to challenge the validity of the said deeds in a manner known to law. Further more, the appellant / plaintiff has only sought the relief of partition but the validity of the said deeds were not challenged. Even if it had been done, in the considered opinion of this Court, it would be beyond the period of limitation. If really the appellant / plaintiff is aggrieved, she could have challenged the settlement deeds and release deeds during the lifetime of her father which would have made clear the intention of the executant.

15. As stated earlier, even if the burden is cast on the defendants to establish the truth and validity of the documents, they have been proved beyond doubt that the executant Mohammed Abdul Khader had executed them with a sound and disposing state of mind. No doubt, since the executant had settled and released his rights over the suit property even during his lifetime, he has no right or interest in the same as they had been accepted and acted upon by the defendants. The release deeds only ensure delivery of possession of the property. Thus the defendants have established that Mohammed Abdul Khader was not only physically active in the execution of the deeds but also involved mentally in doing so. When there is no material to conclude that the executant was not in a fit physical or mental state at the time of execution of the deeds, there is no reason to interfere with the concurrent findings of the Courts below.

16. Under Section 100 of the Civil Procedure Code, a second appeal is maintainable only if the case involves a substantial question of law. In the present case, the decisions of the Courts below do not involve any question of law at all and certainly, not a substantial question of law. Both the courts have found as a fact that the executant had executed the deeds only in a sound and disposing state of mind. The decisions of the courts below do not involve any substantial question of law at all. As there is no justification in holding that the judgment and decree of the courts below are perverse and indefensible, there is no scope for interference.

17. In view of above proposition of law, I find no question of law, much less, substantial question of law in the present appeal so as to interfere under section 100 of the Code of Civil Procedure. The appeal, thus, has no force and is liable to be dismissed.

In the result, the Second Appeal fails and the same is dismissed. Consequently, the judgment and decree dated 26.06.2008 passed in A.S. No. 521 of 2006 on the file of the learned VI Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 05.04.2006 in O.S. No. 3395 of 2000 passed by the learned I Assistant Judge, City Civil Court, Chennai, are affirmed by this Court for the reasons ascribed in this Appeal. In view of the relationship between the parties, there will be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Deputy Registrar

True Copy

Sub Assistant Registrar

To

1. VI Additional Judge, City Civil Court, Chennai,
2. I Assistant Judge, City Civil Court, Chennai
3. The Section Officer
V.R. Section
High Court
Madras.

+1 cc to Mr.M.Devaraj, Advocate,SR.27244.

+3 cc's to Mr.N.Nithianandam, Advocate,SR.27261.

Sr(co)
krd 24/6

S.A. No. 190 of 2015

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