

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 29.01.2015

Pronounced on : 30.01.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.No.611 of 2006

Jaya Ammal .. Appellant/Respondent/Plaintiff

-Vs-

C.Subramaniyan .. Respondent/Appellant/Defendant

Second Appeal filed under Section 100 of C.P.C against the judgment and decree of the Subordinate Judge, Vellore dated 30.06.2005 made in A.S.No.4 of 2004 reversing the judgment and decree of the Principal District Munsif, Vellore dated 24.11.2003 made in O.S.No.871 of 1996.

For Appellant : Mr.V.Srinivasan

For Respondent : No Appearance

JUDGMENT

This second appeal has been preferred against the judgment and decree of the lower appellate court (Sub Court, Vellore) dated 30.06.2005 made in A.S.No.4/2004 whereby, the judgment of the trial court (Curt of District Munsif, Vellore) made in O.S.No.871/1996 dated 24.11.2003 came to be reversed and the decree passed thereon came to be set aside by the lower appellate court.

2. The respondent herein and the appellant herein are brother and sister. The appellant herein filed the original suit O.S.No.871/1996 on the file of the Court of District Munsif, Vellore for declaration of her absolute title to the suit property, recovery of possession, direction to render proper account in respect of the income derived from the suit property from the date of plaint till the date of delivery and for cost. The said prayer was made based on the plaint averments, which are in brief, as follows:

i) The appellant herein and the respondent herein are the daughter and son of Late Chinna Sadaya Gounder. The said Chinna Sadaya Gounder was the owner of the suit property besides other properties. By a family arrangement effected between the parties to

the suit and their father, namely the above said Chinna Sadaya Gounder, the properties owned by their father Chinna Sadaya Gounder were divided between the appellant herein and the respondent herein and the plaint schedule property was allotted to the appellant herein/plaintiff in the original suit, whereas the other properties were allotted to the respondent herein/defendant. However they had agreed that the appellant herein and the respondent herein would take possession of the respective properties allotted to them only after the lifetime of their father, namely Chinna Sadaya Gounder.

ii) In order to give effect to the said family arrangement and in pursuance of the said family arrangement, Chinna Sadaya Gounder executed two Wills simultaneously on 07.10.1985 bequeathing the suit property in favour of the appellant herein/plaintiff and bequeathing the other properties in favour of the respondent herein/defendant respectively. After the execution of the said Wills dated 07.10.1985, the testator, namely Chinna Sadaya Gounder died on 09.06.1986 and the Wills took effect. The appellant/plaintiff got possession of the suit property, as the sole legatee under the will executed in her favour and thereafter she was in continuous possession and enjoyment of the same.

iii) Since the appellant/plaintiff is a resident of a different village than the village in which the suit property situates, she allowed her brother/respondent herein to enjoy the property on her behalf and give a share in the income derived from the suit property. The respondent herein/defendant, who was paying the appellant herein/plaintiff a share in the income derived from the suit property, stopped such payment two years prior to the filing of the suit and he was evading such payment on one pretext or the other. At last, when the appellant/plaintiff sent a legal notice dated 22.07.1996 demanding surrender of possession, the respondent herein/defendant issued a reply notice dated 27.07.1996 containing false and untenable allegations. Hence the appellant/plaintiff was constrained to file the suit for the above said reliefs.

3. The suit was resisted by the respondent herein/defendant denying the plaint averments regarding the alleged family arrangement, enjoyment of the suit property by the appellant herein/plaintiff and entrustment of the same to the respondent herein/defendant on the understanding that he should pay a share in the income derived from the suit property. It was the further contention of the respondent herein/defendant that the Wills were brought into existence by misrepresentation and undue influence; that on coming to know of the same, Chinna Sadaya Gounder, namely the father of the parties to the suit, cancelled those two Wills with the consent of the appellant herein/plaintiff and also the consent of the respondent herein/defendant by registered Revocation Deeds dated 19.11.1985; that besides the Revocation Deeds, Chinna Sadaya Gounder also executed a registered Settlement Deed on 19.11.1985, itself in favour of the respondent herein/defendant for

settling the suit property on him. The said gift made by Late Chinna Sadaya Gounder under the Settlement Deed dated 19.11.1985 was accepted by the respondent herein/defendant, who got possession of the property and patta was issued in his name and that ever since the date of settlement, he was enjoying the same asserting absolute title in him. It was his further contention that as directed by his father, he paid a sum of Rs.14,000/- to the appellant herein/plaintiff, as evidenced by a receipt dated 22.11.1985 acknowledging the receipt of the said amount for giving up any possible claim in respect of the suit property based on the cancelled will. On the basis of the above said contentions made in the written statement, the respondent herein/defendant claimed that the appellant herein/plaintiff did not have any title to the suit property and prayed for the dismissal of the suit with exemplary cost under Section 35A of the Code of Civil Procedure.

4. Based on the rival pleas made by the parties, the learned trial judge framed as many as three issues and nine additional issues, based on which, the parties went for trial. In the trial, two witnesses were examined as PWs.1 and 2 and four documents were marked as Exs.A1 to A4 on the side of the appellant herein/plaintiff, whereas four witnesses were examined as DWs.1 to 4 and 21 documents were marked as Exs.B1 to B21 on the side of the respondent herein/defendant.

5. At the end of the trial, the learned trial judge, on an appreciation of evidence in the light of the points urged on both sides through their counsel in their arguments, came to the conclusion that the appellant herein/plaintiff was entitled to the relief of declaration, recovery of possession, rendition of accounts and also for cost and passed a decree granting the said reliefs and permitting the appellant herein/plaintiff to take separate steps under Order 20 Rule 11 CPC for determination and recovery of mesne profits.

6. The said decree passed on 24.11.2003 was made the subject matter of challenge in the Appeal Suit before the learned lower appellate Judge (Subordinate Judge, Vellore) in A.S.No.4 of 2004. The learned lower appellate judge, upon hearing the appellant and on a re-appreciation of evidence, held that the Will relied on by the appellant herein/plaintiff had been cancelled and hence the claim made by the appellant herein/plaintiff in respect of the suit property could not be sustained. Based on the said finding, the learned lower appellate judge non-suited the appellant herein/plaintiff for the reliefs sought for by her in her plaint, set aside the decree passed by the trial court and dismissed the suit O.S.No.871 of 2006 with cost of the respondent herein.

7. Aggrieved by and challenging the reversing judgment and decree of the learned lower appellate judge made in A.S.No.4 of 2004, the present second appeal has been filed on various grounds set out in the Memorandum of Grounds of Second Appeal.

8. As against an appellate decree of a court subordinate to the High Court, a second appeal shall lie to the High Court only on a substantial question/substantial questions of law involved in the said second appeal. The said condition is found incorporated in Section 100 CPC. It also contains clauses to the effect that the appellant filing a second appeal should precisely formulate the Substantial Questions of Law involved in the second appeal and show the same in the grounds of appeal under distinct head. Sub clause (3) of Section 100 CPC directs that the memorandum of appeal shall precisely state the substantial question of law involved in the appeal. Sub clause (4) is to the effect that if the High Court is satisfied that a substantial question of law is involved in the appeal, it shall formulate such question and sub clause (5) says that the appeal shall be heard on the question as formulated and that the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such a substantial question of law.

9. In compliance with the mandate provided under Section 100 CPC, at the time of admission of the second appeal, the following questions were formulated and recorded by this court as Substantial Questions of Law involved in the second appeal:

Substantial Questions of Law:

"1. Whether the lower appellate court was right in holding that Exs.B3 to B6 are valid in law without properly considering the circumstances surrounding the execution of the said documents, emerging from the evidence on record? and

2. Whether the lower appellate court was right in holding that Ex.B6 could be looked into for a collateral purpose i.e., as a material evidencing the payment of the amount mentioned in Ex.B6 by the defendant in favour of the plaintiff?"

10. Though notice was served on the respondent through court, none has chosen to appear for the respondent. Hence, the arguments advanced by Mr.V.Srinivasan, learned counsel for the appellant were heard and the materials available on record were also perused.

11. The appellant herein/plaintiff is the sister of the respondent herein/defendant. They are the daughter and son of late Chinna Sadaya Gounder, who admittedly died on 09.06.1986. According to the appellant herein/plaintiff, the said Chinna Sadaya Gounder did not die intestate and on the other hand, he died leaving two simultaneous wills dated 07.10.1985. According to her, the suit property was bequeathed by her father in her favour making her the sole legatee under the said will, whereas all other properties owned by Chinna Sadaya Gounder were dealt with by him in the other will, making the respondent herein/defendant as the sole legatee in respect of those properties. It is not in dispute that those two

wills were registered wills and registered as Document No.20/1983 and 19/1983 in the office of the Sub Registrar, Kaniyambadi. The original will bequeathing the suit property in faovur of the appellant herein/plaintiff has been produced and marked as Ex.B1 and its certified copy has been produced as Ex.A2. The original will dated 07.10.1985 bequeathing the other properties in favour of the respondent herein/defendant has been produced and marked as Ex.B2 and a certified copy of Ex.B2-Will has been produced and marked as Ex.A1 on the side of the appellant herein/plaintiff.

12. Though the respondent herein/defendant, in the earlier part of this written statement, would have chosen to deny the execution, genuineness and validity of the Wills dated 07.10.1985, he had taken a plea in the latter part of the written statement that the said Wills were prepared by misrepresentation and using undue influence. It is his further contention that when Late Chinna Sadaya Gounder came to know the fraud committed by the appellant herein/plaintiff, he cancelled those two wills and executed a registered Settlement Deed in favour of the respondent herein/defendant settling the suit property on him and putting him in possession. The Revocation deeds were also registered. The original Revocation Deeds dated 19.11.1995 registered as document Nos.40/1985 and 39/1985 in the office of the Sub Registrar, Kannamangalam have been marked as Exs.B4 and B5. The original Settlement Deed registered on the file of Sub Registrar, Kannamangalam has been produced and marked as Ex.B3. All the documents Exs.B3 to B5 came to be executed and registered on 19.11.1985 itself. Though the respondent/defendant chose to take a plea in the written statement that the wills dated 07.10.1985 were not genuine, in the subsequent pleadings and in the evidence, he had clearly admitted that the said wills had been executed by Chinna Sadaya Gounder on 07.10.1985. The very fact that he had chosen to produce the original wills as Exs.B1 and B2 makes it clear that the contention of the appellant herein/plaintiff that the original wills were with the respondent/defendant stands confirmed.

13. In an attempt to prove the execution of the said will, the appellant/plaintiff chose to examine herself as PW1 and one Seetharaman as PW2. From Exs.B1 and B2, it is obvious that PW2-Seetharaman was one of the attestors of the wills. Hence the conditions regarding the admissibility of the said wills dated 07.10.1985 under Section 68 of the Indian Evidence Act, 1872 stands complied with. As the execution of Exs.B1 and B2 has been admitted by the respondent herein/defendant, it shall be unnecessary to embark upon a rowing enquiry as to the genuineness and validity of the said wills. On the other hand, since the respondent/defendant has taken a plea that the said wills were subsequently cancelled by the testator Chinna Sadaya Gounder, it shall be a waste of exercise to go into the question "whether Exs.B1 and B2 are genuine?" Even the other points raised by the respondent herein/defendant, namely that the wills were brought into existence by using vitiating

factors misrepresentation and undue influence, has lost its importance in view of his contention that the testator Chinna Sadaya Gounder himself cancelled the wills.

14. A will either registered or unregistered is always revokable by the testator during his life time and it shall take effect only on the death of the testator, provided he has not revoked the said will. Here is a case in which the respondent/defendant has taken a stand, clear and categorical, that Exs.B1 and B2 - Wills were cancelled by the testator Chinna Sadaya Gounder himself on 19.11.1985. It is the contention of the respondent herein/defendant that the appellant herein/plaintiff by her misrepresentation and using undue influence, got Exs.B1 and B2 wills executed on 07.10.1985 and that when he questioned his father Chinna Sadaya Gounder through the well-wishers of the family, Chinna Sadaya Gounder agreed to cancel the wills executed in favour of the appellant herein/plaintiff and also in favour of the respondent herein/defendant, provided the respondent herein/defendant would pay a sum of Rs.14,000/- to the appellant herein/plaintiff. It is his further case that Exs.B1 and B2-Wills were cancelled by Chinna Sadaya Gounder after the respondent herein/defendant agreed to pay the above said amount to the appellant herein/plaintiff and that Exs.B1 and B2-Wills came to be cancelled only after the said amount was handed over to a middle man. It is the clear and categorical case of the respondent herein/defendant that the elders mediated and such mediation resulted in the said consensus which was arrived at and that the appellant/plaintiff also gave her consent for their father's revoking both the wills (Exs.B1 and B2) on the assurance that she would be paid Rs.14,000/-. In this regard, there are ample evidence adduced on the side of the respondent herein/defendant to show that though he was persuaded to see that his properties were given for his son's children, he volunteered to cancel Exs.B1 and B2 wills, after ensuring that a sum of Rs.14,000/- was handed over to a middleman to be paid to the appellant herein/plaintiff.

15. It is pertinent to note that though Chinna Sadaya Gounder was residing at Melvallam which is a place that comes within the jurisdiction of Sub Registrar, Kannamangalam, Exs.B1 and B2 were executed and registered at Kaniyambadi Sub Registrar's office. However, Ex.B4 and Ex.B5 (Revocation Deeds) were executed at Kannamangalam Sub Registrar Office and registered in the office of the SRO, Kannamangalam. PW1 in her evidence stated that she did not know the reason why the wills were registered in the office of Sub Registrar, Kaniyambadi. During cross examination also she stated that she did not see the original wills till her examination as PW1 in the trial court and that she was also not aware as to with whom the wills were. Regarding the execution of the Revocation deeds, her testimony is to the effect that she did not know whether her father executed any other document after the execution of the suit wills dated 07.10.1985. She has also not imputed any motive against the witnesses examined on the side of the respondent

herein/defendant.

16. Addmittedly Chinna Sadaya Gounder died on 09.06.1986. The appellant herein/plaintiff, who claims to have got possession of the suit property by execution of Ex.B1-will and enjoyed the same for a considerable time and thereafter entrusted the same to the respondent herein/defendant on the understanding that he should pay a share in the income derived from the suit property, has not produced even a scrap of paper to show that she was paying kist for the suit property or at least that the revenue assessment had been made in her name. Besides her plain admission that she did not know on whose name the patta for the suit property came to be issued, it is her further admission that the patta does not stand in her name. In support of her contention that she was receiving a share in the income derived from the suit property from the respondent herein/defendant, she has not chosen to produce any evidence, either oral or documentary, excepting her interested testimony.

17. On the other hand, by unassailable documentary evidence in the form Exs.B4 and B5 and examination of witnesses, who knew about the execution of those documents, the respondent herein/defendant was able to prove that Exs.B1 and B2 wills were cancelled by Exs.B4 and B5 - Revocation Deeds. Besides the revocation of Exs.B1 and B2-Wills, Late Chinna Sadaya Gounder has also chosen to execute a registered Settlement Deed under Ex.B3 in favour of the respondent herein/defendant. Pursuant to the settlement, the suit property came to be assigned new sub division numbers viz Sl.Nos.19/11C1, 19/11C2, 19/11C3 and 19/11C4 and patta came to be issued in the name of the respondent herein/defendant in Patta No.62. It is evident from Ex.B7-Patta Pass-Book issued in the name of the respondent herein/defendant and also Exs.B9 - Patta, B10-Chitta issued in the name of the respondent/defendant in respect of the suit property. Ex.B11-Adangal extract, Exs.B12 to B21-Kist receipts show that all along the respondent herein/defendant had been making payment of kist in respect of the suit property in his own name and not on behalf of the appellant herein/plaintiff. In short, all the revenue records are in the name of the respondent herein/defendant. The same is based on the gift settlement made by Late Chinna Sadaya Gounder in respect of the suit property in favour of the respondent herein/defendant under Document No.1106/1985 registered on the file of Sub Registrar, Kannamangalam, which has been produced and marked as Ex.B3. Regarding the execution of Ex.B3 and the enjoyment of the suit property by the respondent herein/defendant, clear oral and documentary evidence have been adduced. Regarding possession, as against the want of evidence on the side of the appellant herein/plaintiff to prove that at any point of time she was in possession and enjoyment of the same or that at any point of time she was in receipt of a share from the income derived from the suit property from the respondent herein/defendant, the respondent/defendant has adduced reliable and sufficient oral and documentary evidence as indicated supra.

18. It is pertinent to note that not only Ex.B1-Will dated 07.10.1985 executed in favour of the appellant herein/plaintiff in respect of the suit property came to be cancelled by Ex.B4-Revocation deed, but also the will executed in favour of the respondent herein/defendant under Ex.B2 bequeathing more properties in favour of the respondent/defendant came to be cancelled under Ex.B5-Revocation Deed. After such revocation of Ex.B1 and B2-Wills, Ex.B3-Settlement Deed came to be executed on the very same day in favour of the respondent herein/defendant in respect of the suit property. Though the witnesses examined on the side of the respondent herein/defendant have referred to the settlement in favour of the sons of the respondent/defendant, there is dearth of evidence regarding the same showing what are all the properties settled on them. Since the present suit from which the second appeal has arisen is only with regard to the suit property, it is unnecessary to consider who got the other properties and how did they get it. Suffice to point out that Ex.B1-Will bequeathing the suit property in favour of the appellant herein/plaintiff was cancelled subsequently under Ex.B4 and the said property was settled in favour of the respondent herein/defendant under the gift Settlement Deed dated 19.11.1985 marked as Ex.B3. It is also clear from the evidence that the respondent herein/defendant accepted the gift, got possession of the suit property, got patta in his name and was enjoying the same as his absolute paying kists in his name.

19. By way of moral justification for depriving the appellant herein/defendant of the future benefit sought to be conferred by Ex.B1-will, the testator himself had ensured that she was getting a cash payment of Rs.14,000/-. The said amount, according to the respondent/defendant, was handed over to by the respondent herein/defendant to the testator, who in turn, asked it to be entrusted to a middleman to be handed over to the appellant herein/plaintiff after the execution of the Revocation deeds and settlement deed. Accordingly, after the execution of Exs.B3 to B5 dated 19.11.1985, the amount came to be paid and the same was acknowledged as evidenced by Ex.B6. Though the said document has been prepared as if she was giving up all her claims in respect of the suit property, the same has not been used for the purpose of establishing any right or title in respect of the suit property, but for the collateral purpose showing that the appellant/plaintiff was paid a sum of Rs.14,000/- for her not raising any objection and for giving her consent for the revocation of Ex.B1-Will dated 07.10.1985 by her father Chinna Sadaya Gounder. In fact, on the date of execution of Ex.B6, she did not have any vested right in respect of the properties bequeathed under Ex.B1-will. An attempt to release the property which might come to her on the death of her father would amount to only a transfer of spes successionis. As per Section 6 of the Transfer of Property Act, 1882, a spes successionis - a mere chance of succession cannot be a property capable of being transferred. Section 6(a) says that chance of an heir-apparent succeeding to an estate, the character of a relation obtaining a legacy on the death of a kinsman, or any other mere

possibility of a like nature, cannot be transferred. When that is so, Ec.B6 cannot be treated as a release deed. It can be treated as a document containing the consent of the appellant for revocation of Ex.B1-Will. Though strictly speaking the consent of the legatee under the will for such revocation is unnecessary. The said document also evidences the payment of a sum of Rs.14,000/- to the appellant by the respondent, as per the direction of their father, who wanted something to be given to his daughter after revoking the Will executed in her favour. Ex.B6 has been sought to be relied on to prove that the settlement made in favour of the respondent/defendant in respect of the suit property was made after ensuring that a sum of Rs.14,000/- was paid by the settlee under Ex.B3 to the daughter of the settlor, namely the appellant herein. Only in order to prove such payment, Ex.B6 has been produced. Hence, the non-registration of the said document does not impede its admissibility of the same, more so for the above said collateral purpose.

20. The learned lower appellate judge has considered all the above aspects in proper perspective and on re-appreciation of evidence arrived at a correct conclusion that Ex.B1-Will had been cancelled and the respondent herein/defendant got the suit property by way of a gift settlement under Ex.B3. The said finding of the lower appellate court, which is the final court of appeal on facts, cannot be termed either defective or infirm much less perverse, capable of being interfered with by this court in exercise of its power of appeal in the second appeal. The findings of the lower appellate court that Exs.B3 and B6 are valid in law, cannot be said to be perverse or against law, capable of being interfered with by this court. As pointed out supra, Ex.B6 has been used for the purpose of showing that a sum of Rs.14,000/- was paid to the appellant herein/plaintiff on the direction of his father Chinna Sadaya Gounder and hence the same is not inadmissible for want of registration. The same is very much admissible under proviso to Section 49 of the Registration Act.

21. Accordingly, both the substantial questions of law are answered against the appellant herein/plaintiff and in favour of the respondent herein/defendant. In view of the answers given to the substantial questions of law, the inevitable result shall be the dismissal of the second appeal confirming the decree passed by the lower appellate court.

In the result, the second appeal is dismissed. However considering the relationship of the parties and the nature of the dispute, this court directs that there shall be no order as to cost.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

asr/-

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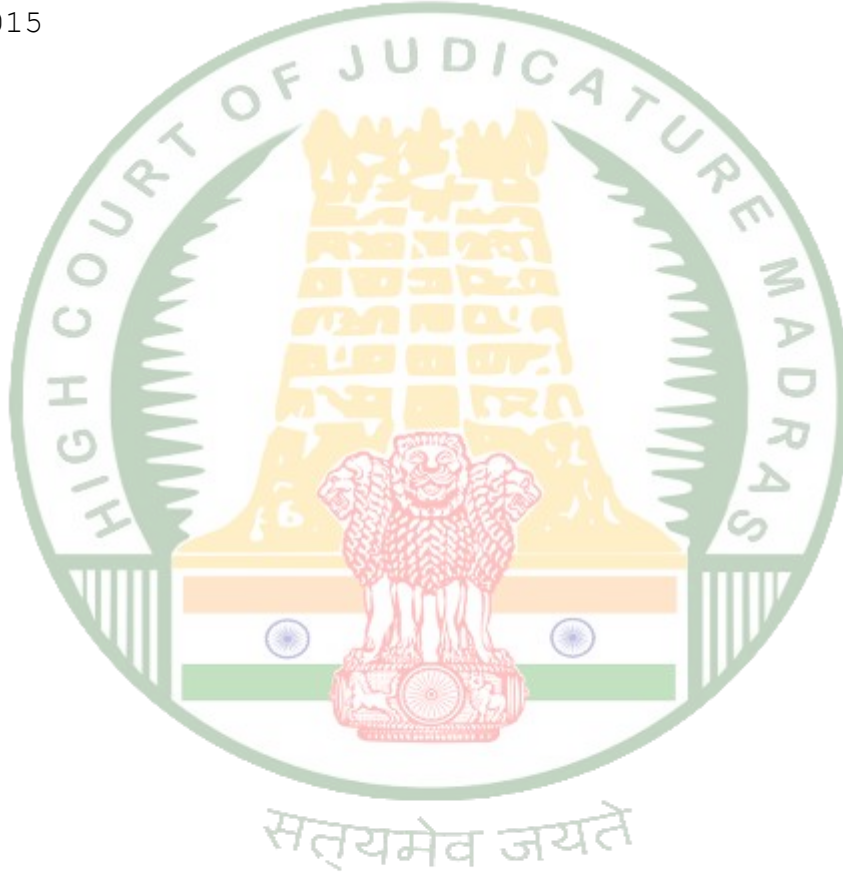
- 1.The Subordinate Judge, Vellore
- 2.The Principal District Munsif, Vellore.

Copy to:The Section Officer, V.R.Section,High Court, Madras

1 cc to Mr. S.Kalyanaraman,Advocate, SR.No.5067

S.A.No.611 of 2006

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