

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 03.08.2016
Delivered on : 19.08.2016

CORAM

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

Original Side Appeal No.295 of 2006
and
Cross Objection No.132 of 2010

A.Annapporani ... Appellant in
O.S.A.No.295 of 2006/Plaintiff
.... 1st respondent in
Cross Obj.No.132 of 2010/Appellant

Vs

1.A.Mani
2.A.Raman ... Respondents 1 and 2
in O.S.A.No.295 of 2006/Defendants
Respondents 2 and 3 in
Cross.Obj.No.132 of 2006

3.A.Viswanathan ... 3rd respondent in
O.S.A.No.295 of 2006/Defendant
and Cross-Objector in
Cross Objection No.132
of 2010/Respondent

4.A.Chandrasekar
5.A.Gangabai
6.T.A.Kunjithapatham
7.K.Lakshmi ... Respondents 4 to 7 in
both O.S.A.No.295 of 2006/Defendants
and in Cross.Obj.No.132/10/Respondents

Prayer:- Original Side Appeal preferred under Order 36 Rule 1 of the Original Side Rules, read with Clause 15 of the Letters Patent against the judgment and decree dated 24.2.2006 in C.S.No.1388 of 1993, passed by the learned single Judge.

Cross Objection filed against the judgment and decree dated 24.02.2006, passed in C.S.No.1388 of 1993.

Mr.R.Thiyagarajan for appellant in
O.S.A.No.295 of 2006 and for first
respondent in Cross-Objection No.132/2010

Mr.R.Sundarrajan for 3rd respondent
in O.S.A.No.295 of 2006 and for
Cross Objector in Cross Objn.132 of 2010.

COMMON JUDGMENT

(Judgment of the Court was delivered by A.SELVAM,J.)

The present case is a text book example of, as to how an internecine battle is being fought, for over a period of two decades, by Siblings in respect of a flimsy dispute.

2. These Original Side Appeal No.295 of 2006 and Cross-Objection No.132 of 2010 are directed against the judgment and decree, dated 24.2.2006, passed in C.S.No.1388 of 1993, by the learned single Judge of this Court.

3. The appellant in O.S.A.No.295 of 2006, as plaintiff, has instituted C.S.No.1388 of 1993, on the file of this Court, praying to pass a preliminary decree of partition, wherein, the respondents shown in O.S.A.No.295 of 2006, have been arrayed as defendants.

4. The nubble of the averments made in the plaint may be stated like thus:

The plaintiff is a daughter of deceased T.K.Anantharaman and Meenakshi. The said Anantharaman has passed away on 26.9.1972 and his wife has passed away on 18.3.1973. At the time of demise, the said Anantharaman has not possessed of good health. The defendants 1 to 4 are the blood brothers of the plaintiff. The defendants 5 to 7 are the children of the said Anantharaman, born through his first wife. The sixth defendant has been given ancestral properties, whereas 7th defendant, at the time of marriage has been given enormous jewels and money etc. The properties mentioned in the schedule are the absolute properties of the deceased Anantharaman and he died intestate. The brothers of the plaintiff are duty bound to perform marriage of the plaintiff. But they have not done it. The plaintiff and her three brothers have resided in the suit property and subsequently, the plaintiff has been driven out. The defendants have sent a legal notice dated 30.08.1993, wherein certain clauses of settlement deed have been mentioned. The plaintiff has not been informed about the existence of settlement deed.

The suit properties even now have not been partitioned and in which the plaintiff is having 1/6th share. Under the said circumstances, the present suit has been instituted for the reliefs sought therein.

5. The contraction of the averments made in the written statement filed by the first defendant may be stated like thus:

It is false to aver that the plaintiff is a member of Hindu undivided family. On 8.9.1972, the deceased Anantharaman has executed a settlement deed. At the time of execution, the plaintiff has been present. The plaintiff has addressed a letter to the 4th defendant, wherein, she admitted the terms of settlement deed. It is true to aver that the said Anantharaman has passed away due to illness. At the time of his death, the plaintiff has attained 21 years of age. The plaintiff is not having right of partition in view of settlement deed dated 8.9.1972, except for payment of Rs.20,000/- payable to her at the time of marriage. There is no merit in the suit and the same deserves to be dismissed.

6. In the written statement filed on the side of defendants 2 and 4 it is averred that on 8.9.1972, the deceased Anantharaman has executed a settlement deed, wherein specific provisions have been made in favour of his wife and defendants 1 to 4. In other aspects, defendants 2 and 4 have supported the written statement filed by the first defendant.

7. The written statement filed by the 3rd defendant is similar to that of the first defendant.

8. On the basis of the rival pleadings raised on either side, necessary issues have been framed and after pondering both the oral and documentary evidence, the learned Single Judge has dismissed the suit in respect of claim of partition and decreed the same to an extent of Rs.2,50,000/- to be paid by defendants 1 to 4 and to that effect, a charge is created over the suit second schedule. The judgment and decree passed by the learned Single Judge are being challenged in the present Original Side Appeal as well as in the Cross Objection.

9. Since common question of law and facts are involved in O.S.A.No.295 of 2006 and Cross Objection No.132 of 2010, common judgment is pronounced.

10. The sum and substance of the case of the plaintiff is that the plaintiff and defendants 1 to 4 are the children of one Anantharaman and he passed away on 26.9.1972 and his wife Meenakshi has passed away on 18.3.1973. The suit properties are the absolute properties of the said Anantharaman and since he

passed away intestate, the plaintiff is having right of partition to an extent of 1/6th share and since defendants 1 to 4 have denied her right, the present suit has been instituted for getting the reliefs sought therein.

11. The defence put forth on the side of defendants 1 to 4 is that the suit properties are the absolute properties of Anantharaman, who is none other than their father as well as plaintiff and he voluntarily executed a settlement deed dated 8.9.1972 in favour of the plaintiff and defendants 1 to 4 and also in favour of their deceased mother and as per the terms of settlement deed, dated 8.9.1972, the plaintiff is not having right of partition and at the most, she can enforce the clause which is available in her favour.

12. The learned Single Judge, after analysing the divergent contentions raised on either side, has rejected the claim of partition and as per relevant clause mentioned in the settlement deed, dated 8.9.1972, directed defendants 1 to 4 to pay a sum of Rs.2,50,000/- to the plaintiff with interest and to that effect a charge is created in the suit second Schedule.

13. Before perpending the rival submissions made on either side, it has become shunless to look into the correct position of law in respect of a Will/Settlement.

14. It is an avowed fact that Section 63 of the Indian Succession Act, 1925 deals with execution of unprivileged Wills and the same reads as follows:

"Every testator, not being a soldier employed in an expedition or engaged in actual warfare or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the

testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

15. As per Section 63(c) of the said Act, it is made clear that a Will must be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or must also see some other person sign the Will, in the presence as well as direction of the executant or must receive personal acknowledgment from the executant. Likewise, each of the attesting witnesses shall sign the Will in the presence of executant and at the same time, it shall not be necessary that more than one attesting witness must be present at the time of execution and further, no particular form of attestation is necessary.

16. It is an acknowledged fact that Section 123 of the Transfer of Property Act, 1882 deals with the procedure of making a gift of immovable property and the same reads as follows:

"123. Transfer how effected - For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses."

17. From a mere perusal of the said Section, it is discernible to the effect that gift of an immovable property has to be effected by a registered instrument signed by the donor and attested by at least two witnesses.

18. At this juncture, it is apposite to look into Section 68 of the Indian Evidence Act, 1872 and the same reads as follows:

"68. Proof of execution of document required by law to be attested - If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

19. The provision of Section 68 and also Proviso clause mentioned supra can be vivisected as follows:-

(a) In the case of a Will, its execution as well as attestation must be established by way of examining an attesting witness, otherwise, the same cannot be used as evidence.

(b) In the case of a gift/settlement, it is not necessary to call an attesting witness for the purpose of proving its execution, unless its execution has been specifically denied by the person by whom it is said to have been executed.

(c) In AIR 2009 SC 951 (K.Lakshmanan vs. V.Thekkayil Padmini), the Hon'ble Supreme Court has categorically held that execution of a gift deed has to be established by way of examining an attesting witness if execution of such gift deed is specifically denied.

20. With these legal backdrops/principles, the Court has to analyse the rival submissions made on either side.

21. The learned counsel appearing for the appellant/plaintiff has contended with great vehemence to the effect that the suit properties are the absolute properties of deceased Anantharaman, who is none other than the father of the plaintiff and defendants and during his life time, he has not executed any document much less the settlement deed dated 8.9.1972. But on the side of defendants 1 to 4, the alleged settlement deed dated 8.9.1972 has been marked as Ex.D1 and the same is not at all a settlement deed and at the most the same can be construed as a Will and since on the side of defendants 1 to 4, one of the attesting witnesses found therein has not been examined, Ex.D1 cannot be taken as evidence, as per Section 68 of the Indian Evidence Act, 1872 and the learned Single Judge, without considering the legal impediment attached to Ex.D1, has erroneously dismissed the suit and therefore, the judgment and decree passed by the learned Single Judge are liable to be set aside.

22. In order to supplant the contentions put forth on the side of the appellant/plaintiff, the learned counsel appearing for the 3rd respondent/cross objector has also equally contended to the effect that the deceased Anantharaman, during his life time, has voluntarily executed Ex.D1, wherein specific provisions have been made in favour of the plaintiff, defendants 1 to 4 and their deceased mother Meenakshi. Since the plaintiff has not been given any property right under Ex.D1, she has had no locus standi to institute the present suit and the learned Single Judge has rightly declined to accept the relief of partition, but erroneously granted a decree for a sum of Rs.2,50,000/- against defendants 1 to 4. Under the said circumstances, Cross-Objection No.132 of 2010 has been filed and therefore, Original Side Appeal No.295 of 2006 is liable to be dismissed, whereas, Cross-Objection No.132 of 2010 is liable to be allowed.

23. Before excogitating the rival submissions made on either side, the Court has to carefully and dispassionately analyse the correct legal position for construing a document is a 'Will' or 'Settlement', with the aidance of the following decisions.

24. The learned counsel appearing for the appellant/plaintiff has relied upon the following decisions:

(i) 1981 Madras Law Journal Reports 171 (Damodaran Pillai vs. Dhanalakshmi Ammal alias Kuttiammal and Others), wherein, the Division Bench of this Court has held as follows:

"It is well settled that the nomenclature given to a particular document by the executant is not conclusive and the nature or legal character of a document has to be ascertained from the contents thereof. In construing a document, the fundamental rule is to ascertain the intention of the executant from the words used and the other surrounding circumstances appearing in the case."

(ii) In 1979 The Madras Law Journal Reports 88 (Ramaswami Naidu vs. M.S.Velappan and Others), the Division Bench of this Court has held that if in a given instrument there is a present disposition and vesting of right in praesenti, the instrument is nothing but a settlement.

25. The Court has to further look into the said legal position by way of relying upon the following decisions:

(i) In 1998-1-L.W.239 - 1.Palaniammal (died) 2.Lakshmi vs. Pasumayil and two Others, wherein this Court has held that if a right in praesenti is created through an instrument, the same is nothing but a 'settlement deed'.

(ii) In AIR 2004 Supreme Court 3464 - V.Sreeramachandra Avadhani (D) by L.Rs. v. Shaik Abdul Rahim and Another, wherein, the Hon'ble Supreme Court has held that if a gift deed has been executed in respect of an immovable property, wherein transfer has been effected in praesenti, the subsequent conditions mentioned therein are nothing but void.

(iii) In (2015) 3 Supreme Court Cases 164 - Phool Patti and another vs. Ram Singh (Dead) Through legal representatives and another, wherein the Hon'ble Supreme Court has held that if a gift/settlement deed has been executed in favour of a person, who is having pre-existing right over the property, the document need not be compulsorily registered.

(iv) In AIR 2015 Supreme Court 2499 - H.Lakshmaiah Reddy and Others v. L.Venkatesh Reddy, the Hon'ble Supreme Court has held that mutation entries do not convey or extinguish any title and those entries are relevant only for the purpose of collection of land revenue.

(v) In AIR 1996 Supreme Court 2220 - Namburi Basava Subrahmanyam vs. Alapati Hymavathi and others - wherein the Hon'ble Supreme Court has categorically held that if a deed creates right and interest 'in praesenti', the same is nothing but a 'settlement deed'.

(vi) In 1998-2-L.W.675 - A.Alphonese and another v. Vincent and 7 others - this Court has held that if any express dispositive words being used and vested interest created in a document, the same is nothing but a 'settlement deed'. The reservation of life estate in favour of the executant would not affect the transfer which has taken place in the present deed.

26. From conjoint reading of the decisions referred to supra, the Court can easily cull out the following legal aspects:

(a) If a document has created transfer of an immovable property in praesenti, the same is nothing but a settlement and not a Will.

(b) After making transfer in praesenti, any conditions/stipulations mentioned in the document are nothing but void.

(c) Mutation entries do not transfer title and the same are relevant only for the purpose of land revenue.

(d) If a settlement has been created in favour of a person who is having pre-existing right, in respect of the property in question, the same need not be compulsorily registered.

27. On the basis of the settled principles of law, the Court has to look into the recitals of the Settlement deed dated 8.9.1972. The settlement deed dated 8.9.1972 has been marked as Ex.D1, wherein, it has been clinchingly stated that the present plaintiff, defendants 1 to 4 and their mother, by name, Meenakshi are settlees. In page No.4 of Ex.D1, it is mentioned like thus:

"The Settlor hath this day conveyed and transferred the property unto the Settlees by way of settlement subject to the following limitations and conditions. . ."

It has already been pointed out that for deciding a particular document is a 'Will' or 'Settlement', the recitals mentioned therein have to be looked into and further, if a transfer is taken place in praesenti, the document is nothing but a 'Settlement' and not a 'Will'.

28. In the instant case, as mentioned supra, the words 'conveyed' and 'transferred' the property have been mentioned in Ex.D1 and it shows that Ex.D1 is nothing but a Settlement deed and not a Will, as contended on the side of the appellant/plaintiff. Since Ex.D1 is a Settlement deed, from the date of its execution it has come into effect and defendants 1 to 4 have become absolute owners of the property mentioned therein, subject to the other terms mentioned in Ex.D1.

29. The main argument put forth on the side of the appellant/plaintiff is that Ex.D1 is nothing but a 'Will' and its execution as well as attestation have not been established as contemplated under Section 68 of the Indian Evidence Act, 1872.

30. It is true that on the side of defendants 1 to 4, no attesting witness has been examined. But as pointed out earlier, this Court is of the considered view that Ex.D1 is a 'Settlement Deed' and its execution has to be proved by way of examining any one of the attesting witnesses, if there is a clear denial on the part of the executant. In the instant case, such a situation has not arisen. Even for the sake of argument, the execution of Ex.D1 has to be proved by way of examining one of the attesting witnesses, in the instant case there is no specific denial on the part of the appellant/plaintiff, even though before instituting the suit, she has been appraised of the existence of Ex.D1. The entire plaint proceeds on the basis that the deceased Anantharaman has passed away intestate.

Therefore, it is quite clear that in the absence of specific denial on the part of the appellant/plaintiff in respect of Ex.D1, the Court cannot come to a conclusion that the argument advanced on the side of the appellant/plaintiff holds good.

31. As stated earlier, the learned Single Judge, after making elaborate discussions, has found that Ex.D1 is a settlement Deed. Under the said circumstances, the learned Single Judge has rejected the claim of partition and decreed the suit in respect of Rs.2,50,000/- in favour of the appellant/plaintiff.

32. The learned counsel appearing for the 3rd respondent/Cross Objector has contended to the effect that the present suit has been instituted only for getting the relief of partition, but the learned Single Judge, without considering the nature of the relief sought in the suit, has erroneously passed a decree to an extent of Rs.2,50,000/- with interest in favour of the appellant/plaintiff and the same is not legally sustainable.

33. The consistent defence put forth on the side of defendants 1 to 4 is that their father has executed Ex.D1, on 8.9.1972, whereby they acquired absolute right, title and interest over the suit second schedule.

34. The learned Single Judge has directed defendants 1 to 4 to pay a sum of Rs.2,50,000/- to the appellant/plaintiff only on the basis of further recitals (terms) mentioned in Ex.D1.

In clause.4 of Ex.D1 it is stated like thus:

"The 6th settlee is entitled to mortgage the property to an extent of Rs.20,000/- (Rupees twenty thousands) only or claim the same from other sharers, on the security of the property which shall be a first charge on the property and only the remaining shares of the property shall be taken as follows"

Clause.5 reads as follows:

"After payment of the sum of Rs.20,000/- towards the marriage expenses of the Sixth Settleee, the Settlees 2, 3, 4 and 5 shall take the property, after the life time of the First Settlee and enjoy the same likewise, without powers of alienation or charge or mortgage."

35. From a cumulative reading of Clauses 4 and 5, the appellant/plaintiff is entitled to mortgage the suit second schedule to an extent of Rs.20,000/- or she can claim the same from other sharers.

36. At this juncture, the learned counsel appearing for the third respondent/Cross-Objector has argued to the effect that the appellant/plaintiff herself has executed a Will and the same has been marked as Ex.P2, wherein, it has been explicitly stated to the effect that she is the wife of one O.M.Ramanujan and he is an instrument to institute the present suit and therefore, the learned Single Judge has erred in granting a money decree to the tune of Rs.2.50 lakhs in favour of the appellant/plaintiff.

37. It has already been pointed out that as per Ex.D1, defendants 1 to 4 are having absolute right, title and interest over the suit second schedule. In the very same Ex.D1, Clause (4) is found place, wherein, it has been specifically stated that the Sixth Settlee, viz., the present appellant/plaintiff is entitled to mortgage the property mentioned therein to an extent of Rs.20,000/- or claim the same from other sharers. Therefore, it goes without saying that the appellant/plaintiff, by way of Ex.D1, can very well claim the said sum of Rs.20,000/- from defendants 1 to 4. Further, simply because in Ex.P2 she has been mentioned as wife of O.M.Ramanujan, her right created in Ex.D2 cannot be denied. Further it is a settled principle of law that a party to a document cannot be allowed to approbate or reprobate. Further, the learned Single Judge has not passed such kind of money decree in the present case either on the basis of sympathy or on the basis of empathy. The learned Single Judge has passed such kind of money decree only on the basis of right of the appellant/plaintiff created in Ex.D1. Further, the learned Single Judge, after considering the fact that Ex.D1 has come into existence on 8.9.1972 and the present suit has been instituted in the year 1993 and also after considering the present pitiable condition of the appellant/plaintiff, has rightly passed the money decree mentioned supra. Further it is seen from the evidence given by the appellant/plaintiff that now she has been abruptly left in the lurch by defendants 1 to 4.

38. On the side of the appellant/plaintiff, an abortive attempt has been made to the effect that since Ex.D1 is a Will and the same has not been probated, defendants 1 to 4 are not entitled to claim anything on the basis of Ex.D1.

39. In support of the contention put forth on the side of the appellant/plaintiff, the decision reported in AIR 1962 Supreme Court 1471 - Mrs.Hem Nolini Judah (since deceased) and after her legal representative Mrs.Marlean Wilkinson vs. Mrs.Isolyne Sarojbashini Bose and Others, is relied upon, wherein, the Hon'ble Supreme Court has held that as per Section 213 of the Indian Succession Act, 1925, a Will has to be probated, otherwise, the same cannot be looked into.

40. Even at the risk of repetition, the Court would like to point out that Ex.D1 is nothing but a 'Settlement deed' and not a 'Will'. Therefore, the last attempt made on the side of the appellant/plaintiff also goes out without merit.

41. Before parting with this case, the Court would like to sum up the following factual aspects.

The deceased Anantharaman has executed Settlement Deed viz., Ex.D1, by which defendants 1 to 4 have acquired right, title and interest over the suit second schedule. The defendants 1 to 4 are bound to pay Rs.2,50,000/- to the appellant/plaintiff. The learned Single Judge has rightly found that Ex.D1 is a Settlement Deed and also rightly granted a money decree as mentioned supra.

42. In the light of the discussion made earlier, this Court is of the view that the argument advanced on the side of the appellant/plaintiff cannot be accepted. Likewise, the argument advanced by the third respondent/Cross-Objector with regard to the money decree passed in the suit is also sans merit and altogether both Original Side Appeal No.295 of 2006 and Cross Objection No.132 of 2010 are liable to be dismissed.

In fine, the Original Side Appeal No.295 of 2006 and Cross Objection No.132 of 2010 are dismissed without cost. The judgment and decree passed in C.S.No.1388 of 1993, by the learned Single Judge of this Court are confirmed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

The Sub Assistant Registrar,
Original Side, High Court, Madras.

+1cc to Mr.R.Sundararajan, Advocate sr.47371
+2cc to M/S.r.Thiagarajan, Advocate sr.47618

Original Side Appeal No.295 of
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No.132 of 2010

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