

Reserved On: 23-08-2016

Delivered On: 02-09-2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02-09-2016

CORAM

THE HONOURABLE THIRU JUSTICE M. DURAISWAMY

C.R.P.(NPD)No.719 of 2012
and M.P.No.1 of 2012

1. P. Rajavelu
2. S. Govindaraj

... Petitioners

vs

1. Udayapriya
2. Minor Vishnavidevi
3. G. Senthilkumar
4. Visalatchi

.... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the order passed by the Subordinate Judge, Sankagiri, Salem District dated 27.6.2011 in I.A.No.359 of 2008 in O.S.No.17 of 2006.

For petitioners : Mrs.Pushpa Menon
For R.1 & R.2 : Mr.T.R. Rajaraman
For R.3 & R.4 : Mr.T.P. Manoharan
Senior Counsel for
Mr.R. Nandhakumar

ORDER

Challenging the fair and final order passed in I.A.No.359 of 2008 in O.S.No.17 of 2006, on the file of Subordinate Court, Sankagiri, the defendants 2 and 3 have filed the above Civil Revision Petition.

2. The plaintiffs filed a suit in O.S.No.17 of 2006 for partition, separate possession and for injunction. After contest, the trial Court passed a preliminary decree, allotting 5/12 share to the plaintiffs. The trial Court also restrained the defendants 1 to 3 from putting up any construction in the suit property.

3. Subsequent to the passing of preliminary decree, the plaintiffs filed Final Decree application in I.A.No.187/2007 and in the Final Decree application, the defendants 2 and 3 have filed an

application in I.A.No.359 of 2008, stating that as per Sec.43 of Transfer of Property Act, the property, measuring an extent of 761 sq.ft., settled in their favour, should be allotted to them.

4. The plaintiffs filed their counter, wherein, they have stated that the properties, mentioned in the Gift Deed, did not reach the hands of the defendants 2 and 3, therefore, the claim made by them that the suit property belongs to them, is not correct. Further, the plaintiffs have stated that the existence of the Gift Settlement was not put forth by the defendants 2 and 3 or by the 1st defendant, before the trial Court, before passing of preliminary decree. According to the plaintiffs, the alleged Gift Settlement is not a true and genuine document.

5. The trial Court, taking into consideration the case of both sides, dismissed the application. Aggrieved over the same, the defendants 2 and 3 have filed the above Civil Revision Petition.

6. Heard Mrs.Pushpa Menon, learned counsel appearing for the petitioners and Mr.T.R. Rajaraman learned counsel appearing for

the respondents 1 and 2 and Mr.T.P. Manoharan, learned Senior Counsel, appearing for the respondents 3 and 4.

7. The learned counsel appearing for the petitioners submitted that in view of the provisions of Sec.43 of Transfer of Property Act, the trial Court should have allowed the application, filed by the defendants 2 and 3. The learned counsel further submitted that in view of the Settlement Deed, executed in favour of the defendants 2 and 3, by the 1st defendant, they are entitled to their property, settled in their favour. In support of her contention, the learned counsel relied upon the following judgments:

(i) **2011 6 SCC 462 (Prema vs Nanja Gowda and Ors)**, wherein, the Hon'ble Supreme Court held that there is a statutory change by the introduction of Sec.29A of the Hindu Succession Act which come into force on 5th September, 1985 and the preliminary decree has been passed on 26th December, 1973, but no final decree has been passed. The plaintiff himself filed an application for passing a final decree and the trial court is bound to implement the statutory rights, conferred on the daughters and it ought to have allowed the

petition, in accordance with law.

(iii) **2005 (6) SCC 705 (Smt. Rani Kusum vs Smt. Kanchan Devi and Ors**, wherein the Hon'ble Supreme Court has held that merely because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The Courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

(iii) **1995 (1) L.W 141 (Annapoorani vs Janaki)**, wherein this Court held as follows:

10. In any event, the court ought to have borne in mind the provisions of the Hindu Succession Act and passed a decree in accordance with law. The Court has completely failed to apply its mind to the relevant provisions of law. It should also be noted that the evidence adduced before the court does not also warrant the grant of a declaration as prayed for. The plaintiff's father who has given evidence as P.W. 1, has

merely stated that his daughter is the wife of deceased Velu, and that the property was purchased under Ex. 1. Ex. A-2 is a letter written by the deceased Velu to the plaintiff on 14.7.1983. Thus, on the totality of the evidence and the averments in the plaint, the only decree which could have been legally passed by the Court is to declare the right of the plaintiff to one half share and reject the prayer for recovery of possession. In the normal course, the plaintiff should have been directed to file a suit for partition.

11. When this Court finds that a decree suffers from an error of law apparent on the face of the record owing to non-application of mind of the Court, to the relevant principles of law, this Court cannot keep silent and allow the decree to be in force, particularly, when it causes grave injustice. There can be no doubt whatever that under the Hindu Succession Act, certain persons are designated as Class I heirs and all of them are entitled to succeed to the estate of a deceased Hindu. There is no earthly reason for depriving the mother of the deceased of her legitimate share in the estate which in this case happens to a

moiety. This is a typical case of miscarriage of justice which should be rectified the moment it comes to the notice of this Court. It is only for that reason, I am exercising my powers under Section 115 of the Civil Procedure Code and Article 227 of the Constitution of India.

12. There is no period of limitation for exercising suo motu powers under Section 115 Civil Procedure Code vide **Choudhary Ram Prasad Rai v. Mahesh Kant Choudhary (AIR 1922 Patna 525)** and **Muthu Chettiar Narayanan (AIR 1928 Madras 528)**. It is also held that if a provision of law is completely disregarded by a subordinate court, that will be a ground for exercising the powers under Section 115, Civil Procedure Code vide **Rasu Rattara (AIR 1924 Rangoon 349)**. It is held in that case, "When a Court has applied its mind to the law and decides wrongly, then there is ground for revision; but where it disregards some provision of law, and has not applied its mind to that provision, then there is ground for revision. In **Imam Din v. Shag Singh, (AIR 1931 Lahore 746)**, Jai Lal, J. Held that if an obvious principle of law

is omitted to be applied by the subordinate Judge, it would amount to illegally acting in the exercise of jurisdiction.

8. Countering the submissions made by the learned counsel for the petitioners, Mr.T.P. Manoharan, learned Senior Counsel, appearing for the respondents 3 and 4 submitted that when the defendants 2 and 3 did not raise the issue with regard to the execution of the Settlement Deed in the written statement, they cannot be allowed to raise it as and when they wish. The learned Senior Counsel submitted that the defendants 2 and 3 have not raised anything in the written statement with regard to the execution of the Settlement Deed in their favour. Having remained silent at the time of filing written statement, the defendants 2 and 3 cannot be allowed to raise the said issue after passing of the preliminary decree and in the final decree proceedings. Further, the learned Senior Counsel submitted that the provisions of Sec.43 of Transfer of Property Act are not applicable to the petitioners and the remedy open to the defendants 2 and 3 is only to file a separate suit. In support of his contention, the learned Senior Counsel relied upon the following judgments:

(i) **2009 (4) SCC 60 (Jharu Ram Roy vs Kamjit Roy and Others)**, wherein the Hon'ble Supreme Court held as follows:

5. The First Appellate Court, however, on an appeal preferred by the contesting respondents, reversed the said findings of the Trial Court opining that as the defendant-appellant was a party to the fraud perpetrated by Rajiv Lochan in so far as he was, at all material times, aware that in the year 1990, Nakho Ram was alive and not dead, he cannot take benefit of the said deeds of sale and the same were void ab initio. The High Court, as noticed herein before, has affirmed the said view.

9. In this case, as the appellant averred that although in the deeds of sale, a stipulation was made by Rajiv Lochan that his father had expired, it cannot be said to be a case where he fraudulently or erroneously represented that he was authorized to transfer the said immovable property. As noticed hereinbefore, a finding of fact had been arrived at by the First Appellate Court that the appellant was a party to the fraud and that he was not victim thereof.

(ii) **2000 (7) SCC 104 (S. Saktivel (dead) by LRs vs M. Venugopal Pillai and Others)**, wherein the Hon'ble Supreme Court held as follows:

In sum and substance what proviso (4) to [Section 92](#) provides is that where a contract or disposition, not required by law to be in writing, has been arrived at orally then subsequent oral agreement modifying or rescinding the said contract or disposition can be substantiated by parol evidence and such evidence is admissible. Thus if a party has entered into a contract which is not required to be reduced in writing but such a contract has been reduced in writing, or it is oral in such situations it is always open to the parties to the contract to modify its terms and even substitute a new by oral contract and it can be substantiated by parol evidence. In such kind of cases the oral evidence can be let in to prove that the earlier contract or agreement has been modified or substituted by new oral agreement. Where under law a contract or disposition are required to be in writing and the same has been reduced in writing, its terms cannot be modified or altered or

substituted by oral contract or disposition. No parol evidence will be admissible to substantiate such an oral contract or disposition. A document for its validity or effectiveness is required by law to be in writing and, therefore, no modification or alteration or substitution of such written document is permissible by parol evidence and it is only by another written document the terms of earlier written document can be altered, rescinded or substituted. There is another reason why the defendant/appellant cannot be permitted to let in parol evidence to substantiate the subsequent oral arrangement. The reason being that the settlement deed is a registered document. The second part of proviso (4) to [Section 92](#) does not permit leading of parol evidence for proving a subsequent oral agreement modifying or rescinding the registered instrument. The terms of registered document can be altered, rescinded or varied only by subsequent registered document and not otherwise. If the oral arrangement as pleaded by the appellant is allowed to be substantiated by parol evidence it would mean re-writing of Ex.A/1 and, therefore, no parol evidence is

permissible.

7. In view of the aforesaid legal position on interpretation of proviso (4) to [Section 92](#) we have to examine as to whether settlement deed Ex.A/1 was required to be in writing under the law or not. It is not disputed that by settlement deed Ex.A/1 which is a disposition Muthuswamy Pillai passed on right to property to all his sons who acquired right in the property. Where there is such conferment of title to the property, law requires it be in writing for its efficacy and effectiveness. A document becomes effective by reason of the fact that it is in writing. Once under law a document is required to be in writing parties to such a document cannot be permitted to let in parol evidence to substantiate any subsequent arrangement which has effect of modifying earlier written document. If such parol evidence is permitted it would divest the rights of other parties to the written document. We are, therefore, of the view that the subsequent oral arrangement set up by the defendant-appellant cannot be proved by the parol evidence. Such a evidence is not admissible in evidence.

9. On a careful consideration of the materials available on record, the submissions made by the learned counsel on either side and the judgments relied on by the learned counsel on either side, it could be seen that after passing of the preliminary decree, allotting 5/12 share to the plaintiffs, the defendants 2 and 3 have filed the present application in the Final Decree application filed by the plaintiffs, stating that they are entitled to the property, which was settled in their favour. The contention of the first defendant that the properties, which were partitioned orally, was not rejected by the trial Court at the time of passing of the preliminary decree. Neither the defendants 2 and 3 nor the 1st defendant has stated anything about the alleged Settlement Deed in their written statement. For the first time, the defendants 2 and 3 have contended that the first defendant had executed the Settlement Deed in their favour. Without raising this contention before the trial Court, this contention was raised in the Final Decree application, contending that the defendants 2 and 3 are entitled to a larger extent than what was alleged in the preliminary decree by virtue of Settlement Deed. In the preliminary decree, the plaintiffs were allotted 5/12 share; the first defendant was allotted 6/12 share and the fourth defendant was allotted 1/12

share. The contention of the defendants 1 to 3 before the trial court was that the suit properties were orally partitioned and therefore, the suit is liable to be dismissed.

10. However, the trial Court rejected the contention of the defendants 1 to 3 and passed the preliminary decree for partition. In the Settlement Deed, executed by the fourth defendant, it has been stated that he is entitled to 1/8 share, whereas, the preliminary decree was passed in favour of fourth defendant in respect of 1/12 share only.

11. It is also pertinent to note that the defendants 2 and 3 have paid the Court fee only in respect of 6/12 share. Since the contention, now raised by the defendants 2 and 3, is contrary to the stand taken by them in their written statement, the trial court has rightly dismissed the application. Though there is no dispute with regard to the ratio laid down in the judgments, relied upon by the learned counsel for the petitioners, since the facts and circumstances of the present case are different, they are not applicable. In these circumstances, I do not find any error or infirmity in the order

passed by the trial Court and the Civil Revision Petition is liable to be dismissed as devoid of merits and accordingly, the same is dismissed. No costs. Consequently, connected MP is closed.

02-09-2016

sr

Index:no
website:yes

To
The Subordinate Judge, Sankagiri, Salem Distirct

M. DURAISWAMY,J.,

sr

Pre-Delivery Order in
C.R.P.(NPD)No.719 of 2012

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