

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 30.10.2017

Delivered on : 02.11.2017

CORAM

THE HONOURABLE MR.JUSTICE A.SELVAM

and

THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

Appeal Suit No.500 of 2013

& C.M.P.Nos.2086 and 2087 of 2017

G.Anandhi

...Appellant/Defendant

Vs.

G.Bhuvaneswari

..Respondent/Plaintiff

Prayer:- Appeal suit filed under Section 96 of Code of Civil Procedure, 1908 and Order 41 Rules 1 and 2 of CPC against the Judgment and decree dated 22.03.2013 made in O.S.No.485 of 2012 on the file of the IV Additional District and Sessions Judge, Coimbatore.

For Appellant : Mr.K.M.Vijayan, Senior counsel

for Mr.K.M.Vijayan Associates

For Respondent : Mr.S.V.Jayaraman, Senior counsel

for Mr.M.Arvind Subramaniam

JUDGMENT

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

Challenge in this Appeal Suit is to the Judgment and decree dated 22.03.2013 passed in O.S.No.485 of 2012 by the IV Additional District and Sessions Court, Coimbatore.

2. The respondent herein as plaintiff has instituted O.S.No.485 of 2012 on the file of the trial court for the reliefs of Partition, Declaration and Permanent Injunction, wherein, the present appellant has been arrayed as sole defendant.

3. The material averments made in the amended plaint are that the suit 1st item is originally belonged to one Annammal and the building thereon has been put up by her husband by name Gopalarathinam and he passed away, leaving behind him his wife Annammal and his two daughters viz., th Plaintiff and defendant herein as legal heirs. The suit 2nd item is the absolute property of Annammal and Gopalarathinam. After the death of

Gopalarathinam, his legal heirs viz., wife and daughters have inherited the suit properties. There is no partition between the legal heirs of the deceased Gopalarathinam. It seems that the said Annammal has executed a Settlement Deed dated 09.08.2000 in favour of the defendant and the same is nothing but null and void. The said Annammal has also passed away and in the said circumstances, in both the items of suit property, the plaintiff is having half share and therefore, the present suit has been instituted for the reliefs sought therein.

4. In the written statement filed on the side of the defendant, it is averred that both Annammal and Gopalarathinam are employees and also having independent source of income. The suit 1st item is the absolute property of Annammal. The suit 2nd item is a joint property owned by Annammal and her husband. During their life time, a Will dated 07.02.1996 has been executed, wherein, the suit 1st item has been described as Item No.2 and the same has been bequeathed in favour of the plaintiff. The suit 2nd item has been described as Item No.1 in the said Will and the same has been bequeathed in favour of the defendant. At the time of execution of the Will dated 07.02.1996, the plaintiff is a spinster. The father of the plaintiff and defendant viz., Gopalarathinam passed away on 21.02.1999 and subsequently, the plaintiff got married and divorced her husband. Since the conduct of the plaintiff is not conducive, the mother of the plaintiff and defendant by name Annammal has executed a cancellation deed dated 09.08.2000, whereby, cancelled the Will dated 07.02.1996 and on the same day, she executed a settlement deed in favour of the defendant in respect of half share in the suit 2nd item and also in respect of the suit 1st item. As per settlement deed dated 09.08.2000, the defendant has derived absolute title to the suit 1st item and also half share in the suit 2nd item and by virtue of the Will dated 07.02.1996, she derived title in respect of remaining half share in the suit 2nd item and therefore, the defendant has become absolute owner of the suit properties. The plaintiff has no right, title of interest over the same and therefore, the suit deserves to be dismissed.

5. In the reply statement filed on the side of the plaintiff, it is averred that the settlement deed dated 09.08.2000 is nothing but false. The mother of both the plaintiff and defendant by name Annammal has instituted O.S.No.2923 of 2000 on the file of Principal District Munsif Court, wherein, she stated that she is the absolute owner of the suit property. The remaining averments made in the written statement are false and therefore, the present suit is liable to be decreed as prayed for.

6. In the Additional Written Statement filed on the side of

the defendant, most of the averments made in the reply statement filed on the side of the defendant are denied and subsequently prayed to dismiss the suit.

7. On the basis of the rival pleadings raised on either side, the trial court has framed necessary issues and after analyzing both the oral and documentary evidence, has decreed the suit in part to the effect that the settlement deed dated 09.08.2000 is null and void but also granted a decree of injunction in respect of suit item No.1. In respect of other reliefs sought in the plaint, the trial court has dismissed the suit. Against the judgment and decree passed by the trial court, the present Appeal Suit has been preferred at the instance of the defendant as appellant.

8. Before contemplating the rival submissions, the court has to narrate the following admitted facts.

In the amended plaint filed on the side of the plaintiff, it has been simply stated that both the items of suit properties are originally belonged to parents of both the plaintiff and defendant and since they passed away intestate, the plaintiff is having half share in the suit properties and further averred to the effect that the settlement deed dated 09.08.2000 is nothing but null and void.

9. In the written statement filed on the side of the defendant, at paragraph 8, it has been clearly mentioned to the effect that the suit 1st item is the absolute property of deceased Annammal and the suit 2nd item is jointly owned by the said Annammal and her husband Gopalarathinam and both of them have executed a Will dated 07.02.1996, wherein, the suit 1st item has been bequeathed in favour of the plaintiff and suit 2nd item has been bequeathed in favour of the defendant. After execution of the Will dated 07.02.1996, the conduct of the plaintiff has become hostile to the said Annammal and therefore, on 09.08.2000, she cancelled the Will dated 07.02.1996 and on the same day, she executed a settlement deed in favour of the defendant in respect of the entire suit 1st item and also in respect of her half share in the suit 2nd item. Further, it is averred in the written statement, as per Will dated 07.02.1996, the defendant has derived title to the remaining half share in the suit 2nd item and therefore, the defendant has become absolute owner of the entire suit properties.

10. The learned counsel appearing for the appellant/defendant has repeatedly contended to the effect that the suit 1st item is the absolute property of the deceased Annammal and the suit 2nd item is the absolute property of both Annammal and her husband and both of them have executed the Will dated 07.02.1996, wherein, the suit 1st item has been absolutely given to the plaintiff and the suit 2nd item has been given to the defendant and since the plaintiff has acted against one of

the Executors viz., Annammal, she voluntarily cancelled the Will dated 07.02.1996 in respect of the entire suit 1st item and half share in the suit 2nd item by virtue of cancellation deed dated 09.08.2000 and on the same day, she executed a settlement in favour of the defendant, wherein, she settled entire suit 1st item and her half share in the suit 2nd item and further by virtue of the Will dated 07.02.1996, the remaining half share in the suit 2nd item belongs to the defendant and thus the defendant has become absolute owner of all the suit properties and since the settlement deed dated 09.08.2000 has been registered as per Section 90 and 91 of the Indian Evidence Act, 1872, the same cannot be challenged and the trial court without considering correct legal position, has erroneously declared that the settlement deed dated 09.08.2000 is null and void and also has erroneously passed the decree of perpetual injunction and therefore, the judgment and decree passed by the trial court is liable to be interfered with.

11. Per contra, the learned Senior counsel appearing for the respondent/plaintiff, has raised the following points:-

(1) Even though the deceased Annammal has executed the settlement deed dated 09.08.2000, the same has not come into effect and after execution, she has filed O.S.No.2923 of 2000 on the file of the District Munsif Court, Coimbatore, wherein, the present plaintiff and her husband have been arrayed as defendant. In the plaint filed in O.S.No.2923 of 2000, it has been clinchingly stated that the suit property is the absolute property of the Plaintiff and further the said suit has been instituted on 27.11.2000 and in the said circumstances, the settlement deed dated 09.08.2000 is nothing but null and void.

(2) It is an admitted fact that both deceased Annammal and her husband Gopalarathinam have jointly executed the Will dated 07.02.1996 in respect of their joint properties and since they jointly executed the Will dated 07.02.1996 in respect of their joint properties, the said Annammal has had no right to cancel the same without the consent of the remaining settlor and therefore the cancellation deed dated 09.08.2000 is totally void.

12. On the basis of the divergent submissions made on either side, the court has to analyse the following both factual and legal points.

(1) Whether the deceased Annammal is entitled to cancel the Will dated 07.02.1996 by virtue of cancellation deed dated 09.08.2000 ?

(2) Whether the deceased Annammal is legally entitled to execute the Settlement Deed dated 09.08.2000 ?

(3) Whether the said Settlement Deed dated 09.08.2000 is null and void ?

At the outset, the court has to analyse the third legal point. It is an admitted fact that the suit 1st item is the absolute

property of deceased Annammal. It is also equally an admitted fact that the suit 2nd item has been jointly owned by both the said Annammal and her husband Gopalarathinam.

13. The consistent case of the defendant is that after cancelling the Will dated 07.02.1996, by virtue of cancellation deed dated 09.08.2000, the said Annammal has executed the Settlement Deed in favour of the defendant on 09.08.2000.

14. The Will dated 07.02.1996 has been marked as Ex.B.1 and the cancellation deed and also Settlement deed dated 09.08.2000 have been marked as Ex.B.2 and Ex.B.3. It is an admitted fact that during the month of November 2000, the said Annammal has instituted a suit in O.S.No.2923 of 2000 on the file of District Munsif Court, Coimbatore, against the present plaintiff and her husband, wherein, she has stated to the effect that the suit property is her absolute property. Only on the basis of the averments made in the plaint filed in O.S.No.2923 of 2000 on the side of the plaintiff, it is stated that Ex.B.3, settlement deed has not come into effect.

15. At this juncture, it would be apropos to look into the recitals found in Ex.B.3, wherein, in so many places, it has been clinchingly stated to the effect that Ex.B.3 has come into effect, in presenti and possession of the property mentioned therein has been given to the settlee viz., the defendant.

16. Simply on the basis of the recitals found in Ex.B.3, the court can easily come to a conclusion that Ex.B.3 has immediately come into effect. Further O.S.No.2923 of 2000 has been filed during the month of November 2000, wherein, the present defendant is not a party and further no final judgment has been passed in O.S.No.2923 of 2000 and in the said circumstances, simply on the basis of the averments made in O.S.No.2923 of 2000, the court cannot come to a conclusion that Ex.B.3, Settlement Deed is null and void. The trial court without considering the legal effect of execution of Ex.B.3 and also the fact that the same has come into effect in the presenti, has erroneously found that Ex.B.3 is nothing but null and void.

17. Now, the court has to elaborately analyse the legal points formulated as Point Nos.1 and 2.

18. The learned senior counsel appearing for the respondent/plaintiff has repeatedly contended to the effect that Ex.B.1 is nothing but a joint will executed by the deceased Annammal and her husband Gopalarathinam in respect of their properties and since Ex.B.1 has come into existence in respect

of joint properties of both the executants, the deceased Annammal has no legal right to execute Ex.B.2, cancellation deed and further she is not entitled to execute the settlement deed on the same date.

19. In support of the contentions put forth on the side of the appellant/defendant, the deceased reported in AIR 1964 Madras 291 [Kuppuswami Raja and another Vs. Perumal Raja and others] is relied upon, wherein, at paragraphs 32, 46 and 51, it is observed as follows:-

"A joint mutual will becomes irrevocable on the death of one of the testators if the survivor had received benefits under the mutual Will. There need not be a specific contract prohibiting revocation when the arrangement takes the form of not two simultaneous mutual Wills but one single document. If one single document is executed using the expressions "our property" "our present wishes" "our Will" and such similar expressions, it is strong cogent evidence of the intention that there is no power to revoke except by mutual consent."

20. From a mere reading of the observation made by this court, it is made clear if a single will is executed using expression "our property" "our present wishes" "our Will", it is a strong cogent evidence of the intention that there is no power to revoke except by mutual consent.

21. On the basis of the said legal position, the court has to meticulously analyse Ex.B.1, the Will dated 07.02.1996.

22. In paragraph 2 of Ex.B.1, it is stated like thus:-

"We the Executants 1 and 2 are jointly entitled to the property described as Item I in the schedule hereunder and we have been in joint enjoyment and possession of the said Item No.1 schedule as having been acquired by our joint earnings. We desire to make this last will and testament in favour of our Two daughters viz., Mrs.Anandhi, wife of Mr.Chandrasekaran and Miss.Bhuvaneshwari. "

23. From the clear recitals found in Ex.B.1 with regard to Item No.1 (suit item No.2), the court can easily discern that the suit Item No.2 is a joint property of both the Executants. As per the dictum given by this court in AIR 1964 Madras 291 [Kuppuswami Raja and another Vs. Perumal Raja and others] Ex.B.1 cannot be revoked by one executant without the express consent

of other executant. Therefore, only by mutual consent, the same can be cancelled.

24. It is an admitted fact that under Ex.B.2, the deceased Annammal cancelled Ex.B.1 in respect of half share in the suit 2nd item and also in respect of the suit 1st item (which has been mentioned as 2nd item in Ex.B.1). Considering the legal position mentioned in the decision referred to supra, it is made clear that cancellation of half share of the deceased Annammal in the suit 2nd item, is not legally valid.

25. In Ex.B.1, at paragraph 5, it is observed as follows:-

"The property described hereunder as Item No.2 belongs absolutely to Smt.Annammal executant No.2 and this property viz., Item No.2 in the schedule is bequeathed to Bhuvaneshwari (Second Daughter) to be enjoyed by her absolutely with full powers of alienation."

Further in paragraph 6, it is stated that "This Will come into effect after the life time of both of us with regard to Item No.1 property to the schedule and it will come into effect after the life time of Smt.Annammal with regard to Item No.2 of the schedule."

26. From the recitals found in Ex.B.1 in respect of 2nd item (suit 1st item) mentioned therein, it is made clear that the suit 1st item is the absolute property of deceased Annammal and the same has been bequeathed in favour of the present plaintiff and further Ex.B.1 has come into effect in respect of suit 1st item only after the demise of the said Annammal.

27. Further in paragraph 6 of Ex.B.1, it is clearly stated that both are having power to revoke or cancel Ex.B.1.

28. It has already been pointed out that under Ex.B.2, the deceased Annammal has cancelled Ex.B.1 even in respect of the suit 1st item. Since the suit 1st item is her absolute property and since power of revocation is found place in Ex.B.1, there is no embargo on the part of the said Annammal to cancel Ex.B.1 in respect of the suit 1st item and further with regard to suit 1st item, the dictum given in the decision referred to supra is not applicable.

29. It is an admitted fact that the said Annammal has executed settlement deed dated 09.08.2000 (Ex.B.3) in favour of

the defendant.

30. The main contention put forth on the side of the respondent/plaintiff is that Ex.B.3 is nothing but null and void. It has already been discussed and held that Ex.B.3 is not null and void. But so far as half share in the suit 2nd item, Ex.B.3 is not valid since deceased Annammal has no legal right to cancel Ex.B.1 in respect of suit 2nd item. But so far as the suit 1st item is concerned, as pointed out supra, it is her absolute property and further the dictum found in the decision mentioned supra is not applicable to the suit first item. Therefore, it is quite clear that the deceased Annammal is legally entitled to execute Ex.B.3 only in respect of the suit 1st item and to that extent, Ex.B.3 is a valid document.

31. On the side of the respondent/plaintiff, a faint attempt has been made to the effect that in Ex.B.1, it is stated to the effect that both the Executants are having power of revocation/cancellation and therefore it shows that with regard to the suit 1st item, a mutual Will or a Joint Will has come into existence in the form of Ex.B.1.

32. In Ex.B.1, it has been clinchingly stated that the suit 1st item is the absolute property of the said Annammal and the same has been bequeathed in favour of the plaintiff. Further Ex.B.1 has come into existence in respect of the suit 1st item only after the demise of the said Annammal. Therefore, it goes without saying that with regard to suit 1st item, no mutual or joint Will has come into existence. Therefore, the attempt made on the side of the respondent/plaintiff is sans merit.

33. The present suit has been instituted for the reliefs of declaration, partition and perpetual injunction in respect of the suit 1st item. The trial court has granted the reliefs of declaration and perpetual injunction and denied the relief of partition.

34. It has already been pointed out that the suit 2nd item is a joint property of both the executors of Will viz., Gopalarathinam and his wife Annammal and further it is held that Ex.B.2 is not valid in respect of the suit 2nd item. Further under Ex.B.3, the deceased Annammal has had no right to give her half share in the suit 2nd item to the defendant. Under the said circumstances, the suit 2nd item is a common property of both the plaintiff and defendant. Since the suit 2nd item is a common property of both the plaintiff and defendant and no partition

has been effected so far, relief of partition can be granted only in respect of the suit 2nd item.

35. It has already been pointed out that with regard to the suit 1st item, the deceased Annammal is having absolute interest to cancel Ex.B.1 and also to execute Ex.B.3. Since she is having such kind of power, Ex.B.3 is a valid document and the same has created right, title and interest in favour of the defendant in respect of the suit 1st item. Under the said circumstances, the judgment and decree passed by the trial court are liable to be modified as stated infra.

In fine, this Appeal Suit is allowed without costs. The judgment and decree dated 22.03.2013 passed in O.S.No.485 of 2012 are modified as follows:-

The plaintiff is entitled to get a preliminary decree of partition "in respect of half share in the suit 2nd item and to that extent, the suit is decreed without costs; in respect of other reliefs, the suit is dismissed without costs."

Consequently, connected C.M.Ps., are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

nvsri

To

1.The IV Additional District and Sessions Judge,
Coimbatore.

+4 ccs to M/s.K.M.Vijayan Associates sr 77590,78240

+1 cc to M/s.M.Dravind Subramanian Advocate sr 78119

Appeal Suit No.500 of 2013

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