



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.09.2017

CORAM

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THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

SECOND APPEAL (MD) No.649 of 2016

and

C.M.P. (MD) .Nos.9810 of 2016 and 8237 of 2017

Baskaran

... Appellant/
Respondent/Defendant

Vs .

Arulmery

... Respondent/
Appellant/Plaintiff

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree, dated 04.09.2014, made in A.S.No.7 of 2014 on the file of the learned Sub Judge, Uthamapalayam, reversing the judgment and decree, dated 04.03.2014, made in O.S.No.93 of 2012 on the file of the learned District Munsif, Uthamapalayam.

For appellant ... Mr.G.Vanjinathan
For respondent ... Mr.P.Muthu Vijaya Pandian

JUDGMENT

The defendant is the appellant. The suit was filed by the plaintiff for declaration of title and recovery of possession of the suit schedule property. The plaintiff and the defendant are sister and brother born to one Jeevanantham.

2.The case of the plaintiff is that the said Jeevanantham had executed a settlement deed, dated 12.07.2011, with respect to the plaint schedule property in her favour and she was put in possession on the same date. The plaintiff had been in possession of the suit property till such time she had to move to Chennai. Thereafter, at the request of the defendant herein, the plaintiff had permitted him to reside in the suit schedule property and the defendant has been in occupation of the same. The father of the parties died on 01.11.2011. After the death of the father, when the plaintiff requested the defendant to vacate the premises, the defendant refused to vacate and projected a Will in his favour allegedly executed by the father. Hence, the suit was filed.



3. The defendant had resisted the suit contending that the settlement deed is not binding on the other heirs of Jeevanantham. The said Jeevanantham had executed a Will, dated 05.03.2011, bequeathing all his properties in favour of his legal heirs, including the plaintiff and the defendant. It is further contended that the plaintiff had obtained the settlement deed by coercion and undue influence. Hence, he prayed for dismissal of the suit.

4. Before the trial Court, on the side of the plaintiff, the plaintiff herself was examined as PW1 and Exs.A1 to A4 were marked and on the side of the defendant, the defendant himself was examined as DW1 and another witness was examined as DW2 and Exs.B1 was marked.

5. After considering the oral and documentary evidence, the trial Court had dismissed the suit. But, on appeal, the first appellate Court had decreed the suit as prayed for. Aggrieved by the same, the defendant has preferred the above second appeal.

6. This second appeal was admitted on the following substantial question of law:

"Whether the first appellate Court is justified in decreeing the suit by not considering the fact that if Ex.A1 is true, then the suit for declaration and recovery of possession is not maintainable and only remedy is offered to them is to file a suit for partition?"

7. Heard the learned counsel for the appellant and the learned counsel appearing for the respondent.

8. The case of the plaintiff is that her father had executed Ex.A1 - Settlement deed, dated 11.07.2011, in respect of the suit property which is about 690 sq. ft., at Uthamapuram Village, Cumbum. Though there are other legal heirs to Jeevanantham, the settlement deed - Ex.A1 was executed only in favour of the plaintiff. The settlement deed is a registered one and it is also admitted by the defendant. The plaintiff had permitted the defendant to reside in the suit property, when she moved away from the suit property to live in Chennai. When the defendant refused to vacate the property, the plaintiff had to issue legal notice and file the suit. The settlement deed, which was admitted by the defendant, was held to be true and valid by the Courts below.

9. The defendant had produced Ex.B1 - Will, dated 05.03.2011, which is said to have been executed by the father - Jeevanantham four months prior to the execution of Ex.A1. Once the defendant produced the Will, the same has to be proved by him in the manner known to law. It is contended by the defendant that as per the Will, the bequest is made in favour of all the legal heirs without excluding any one. In the process of proof of the same, the



defendant had examined DW2, who had identified his signature found on Ex.B1. Another attestator was no more. Hence, it was held by the trial Court that the defendant had proved the execution of the Will.

10. It is seen that the defendant had filed only the photocopy of the Will and had not produced the original of the same. It is stated by him that the original Will was given to one of the attestors, who is no more and hence, they could not get original from him. Hence, only a photocopy of the same was filed as exhibit. So far as a Will is concerned, a photocopy of the Will cannot be accepted, as secondary evidence is inadmissible. In the absence of any sufficient and acceptable reason for non production of the original, the first appellate Court had rightly rejected the Will on the ground of admissibility itself. Once the Will is held to be invalid, Ex.A1 - settlement deed has to be upheld as the same is registered and it is also admitted by the defendant. Besides, the suit property is only an extent of 690 sq. ft. If the testator had bequeathed in favour of all the heirs, it would be indivisible.

11. So far as the question of possession is concerned, the defendant claimed to be in possession even during the life time of the father. However, it is admitted by him in his cross examination that he has been in possession only for the last two years and his possession is also on the basis of permissive occupation granted by the plaintiff. Thus, once the settlement deed is upheld, automatically, the Will, with respect to the same property, is held to be invalid. The trial Court had held that both the documents viz., Exs.A1 and B1 are valid, however, dismissed the suit. The first appellate Court held that the Will is inadmissible as the original has not been produced and it has not been proved in the manner known to law. Besides, subsequent to the Will, Ex.A1 has come into existence settling the same property in favour of the plaintiff under registered deed. Though it is contended by the defendant that it was obtained by undue influence, the same has not been proved.

12. The contention of the defendant is that the suit is not maintainable as the settlement deed is with respect to undivided share. Once the settlement deed is upheld, it is open to the plaintiff to seek for partition. DW1 has categorically admitted in his cross examination that Ex.A1 - settlement deed is executed by his father and that the signature found therein belonged to his father. The said settlement deed is also attested by another brother of the plaintiff.

13. In the light of the above circumstances, Ex.A1 is a valid settlement deed in favour of the plaintiff and the plaintiff is entitled for a decree as granted by the lower appellate Court. Thus, the question of law is answered against the defendant.

14. In the result, this second appeal fails and the same is,



accordingly, dismissed, confirming the judgment and decree passed by the first appellate Court. No costs. Consequently, connected miscellaneous petitions are also dismissed.

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Sd/-
Assistant Registrar (RTI)

/True Copy/

Sub Assistant Registrar

To

1.The Subordinate Judge, Uthamapalayam.

2.The District Munsif, Uthamapalayam.

3.The Record Keeper,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

+ 1 CC TO Mr.G.VANJINATHAN, ADVOCATE IN SR No. 80060

+ 1 CC TO Mr.P.MUTHU VIJAYA PANDIAN, ADVOCATE IN SR No. 80638

GCG

TE/JC/SAR-I : 01/11/2017 : 4P/6C

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