

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.07.2018
Pronounced on : 27.11.2018

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.672 of 1999

1. Kaliappa Gounder (Deceased)
2. Kaliammal
3. Periyakali
4. Lakshmi
5. Duraisami

... Appellants/defendants

(Appellants 2 to 5 are brought on record as LR's of the deceased sole appellant vide order of this court dated 11.12.2017 in CMP.No.382 to 384 of 2015)

Vs.

1. Rajamani
2. Ganesan(deceased)

(R2 died. Memo dated 11/06/2018. R1 is recorded as LR of the deceased R2 vide order of court dt 18/06/2018)

... Respondents/plaintiffs

Prayer:- Second Appeal filed under Section 100 of C.P.C., to set aside the Judgment and decree dated 26.02.1999 made in A.S.No.102 of 1993 on the file of the Subordinate Court, Namakkal, reversing the Judgment and Decree dated 28.12.1992 made in O.S.No.26 of 1986 on the file of District Munsif Court, Rasipuram.

For Appellants : M/s.P.Veena Suresh
For Respondent : Mr.T.Dhanyakumar

J U D G M E N T

This second appeal has been filed by the plaintiff/Appellant No.1 against the judgment and decree passed by the Sub-Judge, Namakkal in A.S.No.102 of 1993 dated 26.02.1999 reversing the judgment and decree passed by the District Munsif, Rasipuram in O.S.No.26 of 1996 dated 28.12.1992.

2. The appellant herein has filed a suit in O.S.No.26 of 1986 on the file of the District Munsif, Rasipuram to declare that he has vested right in the suit property which are materialised into an absolute estate after the life time of the

mother Marayee Ammal and for permanent injunction to restrain the defendants and their men from interfering with his possession and enjoyment of the suit property. The learned District Munsif by the judgment dated 28.12.1992 has decreed the suit as prayed for. Aggrieved by the same, the defendants have preferred an appeal in A.S.No.102 of 1993 on the file of the Sub-Judge, Namakkal. The learned Sub-Judge by the judgment dated 25.02.1999 has allowed the said appeal. Consequently, the suit came to be dismissed. Aggrieved by the same, the plaintiff has filed the present second appeal. During the pendency of the second appeal, the original plaintiff/Appellant No.1 died and hence his legal heirs have been impleaded as appellants Nos.2 to 5. The second respondent/second defendant also died during the pendency of this second appeal. Since his wife is already on record as first respondent, other legal heirs have not been impleaded. For the sake of convenience, the parties are referred to as described before the trial court.

3. The averments made in the plaint, are in brief, as follows:

a) The suit property and other properties originally belonged to the plaintiff's maternal grandfather viz., Sengottaya Gounder. The suit property is measuring about 2 acres situated in S.No.102/3 of R. Pudupatti village. The lands in S.Nos.83/1 and 102/2 of R. Pudupatti Village belonged to the father of the plaintiff. Since the Sengottaya Gounder had only three daughters and no male issues, after the death of Sengottaya Gounder and Kali Gounder (plaintiff's father), the properties were enjoyed in common by all the three daughters of Sengottaya Gounder and the plaintiff in common. Under a registered partition deed dated 01.09.1957, all the properties were clubbed together and a partition was effected. In that partition, the suit property measuring two acres in S.No.102/3 was given to the plaintiff's mother Marayee for her maintenance. she was given only the right of enjoyment of the properties for her life time with no right of alienation. Vested remainder was given to the plaintiff. The plaintiff has acquired the right on the date of partition itself in the suit property and it will revert to the plaintiff on the death of his mother Marayee. The suit property and the remaining portions of the plaintiffs are in one block and the plaintiff is cultivating the suit property along with other properties and giving income to his mother, Marayee and providing with him all the necessities and he was keeping her in a comfortable position.

b) The first defendant is the daughter of the deceased sister of the plaintiff. She was given in marriage in a place called Sengaligoundanur, about 13 miles away from the suit property. The plaintiff's mother had been treating the first defendant with affection and giving her all presents, etc., often and on. On 07.12.1985, when the plaintiff was away from

his house, the first defendant along with her husband (second defendant) and others came to the house of the plaintiff under the pretext of seeing the plaintiff's mother and took her to their village offering to bring her back by saying that she requires a change. Since the defendants have not sent back the said Marayee Ammal, the plaintiff suspected that the defendants are going to create some documents prevailing upon the old lady. Hence, the plaintiff has preferred a complaint to Namagiripet Police Station setting out the details. But the plaintiffs could not get at his mother, since she was guarded by the defendants and others. The plaintiff came to know that his mother was brought to the Sub-Registrar's Office at Namagiripet from Sengaligoundanur in a taxi and her thumb impression was taken in the taxi itself and some documents were registered on 10.12.1985. The plaintiff applied for a copy of the document and obtained a copy of the said document and came to know that on 10.12.1985, the defendants have obtained the settlement deed from the plaintiff's mother. In the said settlement deed, it was stated that the plaintiff's mother borrowed a sum of Rs.39,500/- from various persons. There was no necessity to borrow such a huge amount by his mother because he was maintaining her. The said settlement deed is void in law. As per the partition deed dated 01.09.1957, the said Marayee had no right to alienate the property. The plaintiff has vested remainder in the suit property and therefore, the said settlement deed is not valid in law. Hence, plaintiff has issued a lawyer's notice dated 02.01.1986. The defendants have evaded to receive the said notice. Further, the defendants attempted to trespass into the suit property. Hence the plaintiff was constrained to file the suit for declaration and injunction.

4. The averments made in the written statement filed by the first defendant and adopted by the second defendant are, in brief, as follows:

The allegations that the suit property was allotted to the plaintiff's mother Marayee Ammal with a limited right to enjoy the property and she cannot alienate the property are all false. It is also false to allege that the vested remainder was given to the plaintiff. The allegations that the plaintiff is in possession of the suit property and he is cultivating the suit property and maintained his mother are all false. The plaintiff's mother Marayee Ammal was under the care and custody of the first defendant for about four or five years and the first defendant had spent much amount towards medical expenses of the said Marayee Ammal and also discharged the debts of the said Marayee Ammal. The said Marayee Ammal had executed the settlement deed dated 10.12.1985 in favour of the first defendant and put her in possession of the suit property and ever since the date of settlement, the first defendant is in possession and enjoyment of the suit property. The plaintiff is not in possession of the suit property. The allegation that the

defendant took the said Marayee Ammal in a taxi to the Sub-Registrar's Office and obtained thumb impression in the taxi itself and created the settlement deed in favour of the first defendant are all false. The recitals found in the settlement deed are correct. The debts are true and the same were discharged by the first defendant.

5. The plaintiff is not entitled to the suit property as per the terms and conditions of the partition deed dated 01.09.1957. The conditions of the said deed were not fulfilled by the plaintiff and therefore, he is not entitled to the suit property. The allegation that the defendants attempted to trespass into the suit property is false. As per the settlement deed dated 10.12.1985, the first defendant has been put in possession of the suit property. The suit is not maintainable, as the said Marayee Ammal is not added as a party to the suit and therefore, the defendants prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned District Munsif has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and also examined two more witnesses as PW2 and PW3. He has marked Exs.A1 to A23 as exhibits. On the side of the defendants, the first defendant was examined as DW1 and three more witnesses were examined as DW2 to DW4. Exs.B1 to B13 were marked as exhibits on the side of the defendants.

7. The learned District Munsif after considering the materials placed before him, found that as per the partition deed dated 01.09.1957, the said Marayee Ammal was given only a life interest in the suit property and as such, she has no right to execute the settlement deed dated 10.12.1985 in favour of the first defendant. He further found that from the date of execution of the partition deed, the plaintiff was in possession and enjoyment of the suit property. Accordingly, he decreed the suit as prayed for. Aggrieved by the same, the defendants have preferred an appeal in A.S.No.102 of 1983 on the file of the Sub-Court Namakkal. The learned Sub-Judge, has allowed the said appeal and consequently, the suit which was filed by the plaintiff came to be dismissed. Feeling aggrieved, the plaintiff has filed the present second appeal.

8. This court at the time of admitting the second appeal, has formulated the following substantial questions of law:

"i) Whether the learned District Judge erred in construing the recitals of Ex.A1 as conferring an absolute right in Marayee Ammal?

ii) Whether the learned District Judge was correct in upholding the validity of Ex.B9 when PW2 had not spoken about the due execution and attestation of Ex.B9 as required under Section 68 of

Evidence Act?"

9. Heard Ms.P.Veena Suresh, learned counsel for the appellants and Mr.T.Dhanyakumar, learned counsel for the respondents.

10. Substantial Questions of law 1 and 2:

The learned counsel for the appellants has submitted that the recitals of Ex.A1 would clearly show that the said Marayee Ammal was not attempted to entitled to encumber alienate the suit property. She further submitted that the learned Sub-Judge erred in reversing the well considered judgment of the trial court. She further submitted that PW2 had not spoken about the due execution or attestation of Ex.B9 settlement deed as required under Section 68 of the Evidence Act and as such, the findings of the learned Sub- Judge that Ex.B9 which was duly proved is against the law. She further submitted that in view of the recitals in Ex.A1 partition deed, the said Marayee Ammal had no right to execute Ex.B9 settlement deed. She further submitted that the patta and kist receipts which have been produced by the plaintiff would clearly show that even after execution of Ex.A1 partition deed, the plaintiff continued to be in possession of the suit property and he only cultivated the suit properties and gave money to his mother Marayee Ammal for her maintenance. She further submitted that there was no necessity for the said Marayee Ammal for obtaining loans from various persons as mentioned in Ex.B9. She further submitted that at the time of execution of Ex.B9, the said Marayee Ammal was aged about 80 years and she could not have voluntarily executed Ex.B9 and therefore, the said document is not valid in law. She further submitted that the defendants are residing at Sengaligoundanur which is 13 miles away from the suit property and as such, they would not have enjoyed the suit properties and therefore she prayed to allow the second appeal and set aside the judgment and decree passed by the first appellate court and restore the judgment and decree passed by the trial court.

11. Per contra, the learned counsel for the defendants has submitted that though in Ex.A1, in the beginning of the said document, it is stated that the said Marayee Ammal had only life interest in the suit property but in the general clause, it is specifically stated that if the plaintiff is not acted in accordance with her wishes, she can alienate the property whatever she likes. He further submitted that the said Marayee Ammal was suffering from so many ailments due to her old age and one such ailments is that she is having eye sight problem and for that, she took treatment at Namakkal and subsequently, she undergone surgery on her eyes at Arvind Hospital, Madurai and during those days, it was only the first defendant who looked after her. He further submitted that the plaintiff did not take care of his aged mother viz., Marayee Ammal and during her

last days, she was only with the defendants. He further submitted that the defendants only took care of her and taking into consideration of the aforesaid facts and also the fact that she obtained loans from various persons, she executed Ex.B9 settlement deed in favour of the first defendant and therefore, the said document is valid and binding upon the plaintiff. He further submitted that the plaintiff has not disputed the execution of Ex.B9 settlement deed and that being so, he cannot take a plea that the said document was not proved in accordance with law. He further submitted that in Ex.B9 itself, it is clearly stated that the first defendant has been put in possession of the suit property and that being so, the plaintiff cannot claim that he is in possession of the suit property. He further submitted that even as per Ex.A1 partition deed, on the date of the execution of the document itself, the suit property was allotted to the said Marayee Ammal and that being so, the plaintiff cannot claim that he has been in possession and enjoyment of the suit property from the date of Ex.A1. He further submitted that even as per Ex.A1, the said Marayee Ammal is entitled to enjoy the suit property and that being so, during her life time, the plaintiff cannot claim any right over the suit property. He further submitted that the suit was filed on 13.01.1986 and at that time, the said Marayee Ammal was alive but she was not added as a party and therefore, the suit is liable to be dismissed on that ground alone. He further submitted that the trial court failed to consider the aforesaid facts in a proper perspective, but the first appellate court has properly considered those facts and rightly came to the conclusion that the said Marayee Ammal had every right to alienate the suit property and as such, the Ex.B9 settlement deed is valid and as per the said document, the defendants are in possession of the suit property and therefore, the plaintiff is not entitled to get any relief and accordingly, it has allowed the first appeal and dismissed the plaintiff's suit. He further submitted that in the said factual findings, this court cannot interfere and therefore, he requests to dismiss the second appeal.

12. It is an admitted fact that the plaintiff is the son of the deceased Marayee Ammal and the first defendant is the daughter of the plaintiff's sister. The second defendant is the husband of the first defendant. It is also an admitted fact that in the partition deed dated 01.09.1957 (Ex.A1), the suit property was allotted to the said Marayee Ammal for her maintenance and after her demise, the suit property should go to her only son, the plaintiff. In the said document, it is also stated that for cultivation purpose, if necessary, she can obtain loan by giving proper reasons and for that, she can even mortgage the suit property, but it is stated that she should not sell the property. It is also to be pointed out that in the said document, 22 General Clauses were incorporated. Here Clause 22

is relevant which reads thus:

"1 yf;fkpl;lts; tpUj;jhg;gpa fhyj;jpy; mtspl
rt;Fh;ag;go jd;dpl kfd; elf;f jtwptpl;lhy; 1 yf;f
kpl;lts; jd; ghfj;ij ve;j tpjkh d guhjPdKk; bra;J
bfhs;syhk;. "

In the aforesaid document Sl.No.1 refers to Marayee Ammal. From the reading of the aforesaid recitals, it is clear that if the said Marayee Ammal's son (plaintiff) is not acted in accordance with her wishes, she can alienate the property as she likes.

13. The evidence of DW1 would clearly show that the said Marayee Ammal was residing with DW1 for 6 or 7 years prior to her death. Her evidence further shows that the said Marayee Ammal was suffering from eye sight problems and that she was taken to Madurai Aravind Hospital thrice and on third time, a surgery was done. Her oral evidence is corroborated by Exs.B1 to B8 (medical records). PW1 also admitted in his cross examination that his mother took treatment at Madurai Aravind Hospital. But he has not stated that he took his mother to Madurai Aravind Hospital and that itself would show that it was only the first defendant who took care of the said Marayee Ammal in her last days and gave treatment.

14. It is also to be pointed out that DW1 has stated in her evidence that the said Marayee Ammal died only in her house and that the plaintiff not even attended his mother's death. Further he has not performed any last rites. PW1 also admitted in his cross-examination that he was not informed about his mother's death. He further stated that he came to know about his mother's death through one Kaniachi of Vellakal patti and thereafter, he went to the defendants' house and before reaching there, her mother's body was cremated. The aforesaid evidence of PW1 also would show that he has not performed last rites for his mother. If really he had cordial relationship with his mother, he would have performed last rites.

15. Though PW1 has stated in his evidence that he only cultivated the suit property right from the date of Ex.A1 partition deed and he gave money to his mother for her maintenance, he has not produced any documentary evidence to substantiate the same. On the contrary, he has admitted in his cross- examination that he has not even given money for his mother's medical expenses and therefore, the contention of the plaintiff that he only cultivated the suit property from the date of Ex.A1 and gave money to his mother Marayee Ammal for her maintenance cannot be accepted.

16. The plaintiff has stated in his plaint that on 07.12.1985, when he was away from his native village, the

defendants came to the house of the plaintiff under the pretext of seeing the said Marayee Ammal and took her to their village, offered to bring her back by saying that she requires a change. He further stated that on return, he came to know that the defendants and their men have taken his mother but sometimes he was hoping that she would be brought back. But some time later he suspected that the defendants are going to create some documents prevailing upon the old lady and hence he preferred a complaint before the Namagiripet Police setting out the details. He has produced the receipt issued by the Namagiripet Police Station dated 16.12.1985, but he has not produced a copy of the complaint which was given before the police station. If a copy of the said complaint is produced, then only the court will have an opportunity to see what was stated in the said complaint. Under the said circumstances, the contention of the plaintiff that only on 07.12.1985, the defendants took his mother to their house cannot be accepted. In Ex.B9 settlement deed, it is clearly stated that the said Marayee Ammal was residing with the first defendant for the past five years and she only took care of her. All the aforesaid facts would clearly show that the plaintiff did not take care of his mother. It was only the defendants who took care of her. So, it is clear that by exercising the right which was conferred under clause 22 of General Clauses of Ex.A1 partition deed, the said Marayee Ammal had executed Ex.B9 settlement deed in favour of the first defendant.

17. It is to be pointed out that in the plaint itself, the plaintiff has clearly stated that he got a copy of the settlement deed dated 10.12.1985 which was executed by the deceased Marayee Ammal in favour of the first defendant and therefore, it is clear that he has not disputed the genuineness of the said document. Therefore, he cannot take a plea that the said document was not proved as contemplated under Section 68 of the Indian Evidence Act. For proper appreciation, Section 68 of the Indian Evidence Act is extracted hereunder:

"68. 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 Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied."

18. As per the proviso attached to the aforesaid Section, 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 Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied. In this case, Ex.B9 document is not a Will. It is a gift settlement deed which has been registered as per the Indian Registration Act, 1908. The mother of the plaintiff viz., Marayee Ammal has not denied the execution of the said document eventhough she was alive for nearly 1½ month even after execution of Ex.B9 settlement deed. Further the plaintiff also has not disputed the execution of the said document. However, one of the attesting witnesses viz., Sengottuvel was examined as DW2. He has categorically stated that the deceased Marayee Ammal had executed Ex.B9 settlement deed in which he signed as one of the witnesses. Therefore, the contention of the learned counsel for the appellant/plaintiff that Ex.B9 has not been proved as per Section 68 of the Indian Evidence Act cannot be accepted.

19. In Ex.B9 itself, it is clearly stated that on the date of execution of the said document, possession of the suit property was given to the first defendant and as such, the plaintiff cannot claim that he is in possession and enjoyment of the suit property on the date of the filing of the suit. The plaintiff, while his mother was alive, did not take care of his mother. He not even took her to the hospital for taking treatment of her eyes. Further he not even performed last rites to his mother and that being so, he cannot claim property alone. The plaintiff is the only son. Normally, the mother would have much affection over his only son, but in this case, the evidence on record would show that in her last days for the past five years she was away from her only son which itself shows that he is not at all cared about his mother. He neglected his mother Marayee Ammal. Therefore, this court is of the view that the said Marayee Ammal by exercising the right conferred under general clause No.22 of Ex.A1, had executed Ex.B9 settlement deed in favour of her grand daughter (first defendant) and the plaintiff cannot avoid the same.

20. The First appellate court after taking into consideration of the aforesaid facts has allowed the appeal and rightly dismissed the plaintiff's suit and since the said findings arrived at are based on the facts, in the said factual findings, this court cannot interfere. Therefore, the second appeal is liable to be dismissed and accordingly the substantial questions of law are answered.

21. In the result, the second appeal is dismissed. No costs.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

gv

To

1. The Subordinate Judge
Namakkal.

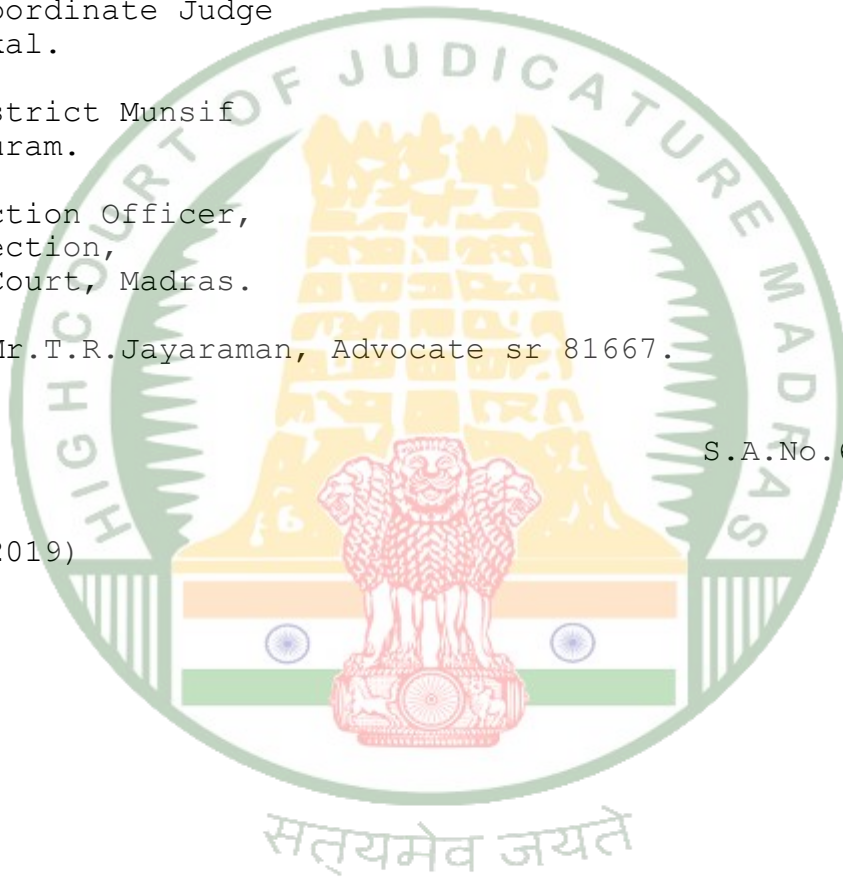
2. The District Munsif
Rasipuram.

3. The Section Officer,
V.R.Section,
High Court, Madras.

+1 CC to Mr.T.R.Jayaraman, Advocate sr 81667.

S.A.No.672 of 1999

BR(CO)
SP(02/05/2019)



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