

IN THE HIGH COURT OF JUDICATURE OF MADRAS

JUDGMENT RESERVED ON : 07.09.2017
JUDGMENT PRONOUNCED ON : 08.06.2018
CORAM:

THE HONOURABLE MR.JUSTICE S.BASKARAN

S.A.NO.1292 OF 2013

AND

M.P.NO.1 OF 2013

1.Chathampalli Kally Janu ...1st Appellant/2nd Defendant
2.Thaikandy Soumini ... 2nd Appellant/4th Defendant

Vs.

1. Chathampalli Kally Vineetha
2. Chathampalli Kally Rajeevan ...1 & 2nd Respondents/
3rd & 4th Plaintiffs

3. Rema
4. Prasanna
5. Nalini
6. Suseela
7. Sathi
8. Vilasini
9. Thaikandy Chandran ... Respondents 3 to 8/
Appellants 5 to 10

10.Thaikandy Dasan(Deceased)
(Deceased R10 is rep. By the second appellants
and 9th respondent vide memo dated 21.08.2017)

...Respondents 9 & 10/
Respondents 3 & 5

This second appeal has been filed under Section 100 of CPC, against the judgment and decree dated 12.09.2013 made in A.S.No.103 of 2006 passed by the learned II Additional District Judge, Pondicherry reversing the Judgment and decree dated 17.10.1995 passed by the learned Subordinate Judge, Mahe in O.S.No.15 of 1994.

For Appellant : Mr.N.Suresh

For Respondents : Mr.V.Manohar for
M/s. A.C.Susheelkumar for
for R1 to R8
Mr.M.Gnanamoorthy for R-9

JUDGMENT

This second appeal arises out of the Judgment and Decree dated 12.09.2013 made in A.S.No.103 of 2006 passed by the learned II Additional District Judge, Pondicherry reversing the Judgment and decree dated 17.10.1995 passed by the learned Subordinate Judge, Mahe in O.S.No.15 of 1994.

2. Brief facts of the plaintiffs' case is as follows:-

The plaintiffs 1 and 2 are children of Chathamally Kally Chappila, who died on 17.10.1986. The plaintiffs 3 and 4 are grand children of the said Chappila by Chappila's daughter Devi, who predeceased Chappila in the year 1974. They have been living in their husband's house since their marriage. The suit property originally belongs to one Chappila as per Kuzhikana Marupattam deed dated 14.01.1945 granted by Pandokkav Ayyappan Devasom. Thereafter, she was in possession and enjoyment of the suit schedule property. In the month of March, 1983, she expressed her desire to gift the property to all her children and the children of deceased Devi reserving herself the right to take usufructs till her death. When the desire was expressed by Chappilla, the husband of the second defendant Krishnan and son of first defendant Dasan, agreed to arrange the execution of necessary documents. Then the document was registered on 11.04.1983, but possession of the property remaining with Chappila, who is the illiterate women. In the month of December, 1983, while Chappilla wanted to make payment of dues as per Kuzhikana Marupattam lease. At that time, the second defendant's husband informed the Chappilla that she however made gift the properties to the first defendant, they alone have to pay the lease amount and not Chappilla. Then only Chappilla realised that she had been made to give out right gift only to the defendants without reserving her rights. As she protested on the intervention of mediatoners with the knowledge of plaintiff and defendants, it was decided to cancel the above said gift deeds and to execute a fresh gift deed in favour of all children. Accordingly, on 11.04.1983, the earlier gift deeds were cancelled and fresh deed was executed on 26.12.1983. Thereafter, in 1994, an application in O.A.No.173 of 1984 J was filed before the Land Tribunal, Mahe to purchase the landlords rights by all the doners. But, minor children were represented by their guardian, the second plaintiffs herein. The defendants contrary to the understanding reached claiming themselves to be in possession on the basis of earlier gift deed executed in their favour made separate application in O.A.No.105/84 J and O.A.No.106/84 J. Both the applications were dismissed by the Land Tribunal, Mahe. Aggrieved over the same, the defendants herein filed the appeal in A.A.No.1/1990 and the appellate Authority, Mahe remanded the applications with direction to the Land Tribunal to hear and disposed of all the three applications in O.A.Nos.105/84 J, O.A.No.106/84 J and

O.A.No.173/84 J together. Accordingly, the Land Tribunal, Mahe, took up all the three applications together and allowed O.A.No.173/84 J, while dismissing the other O.A.No.105/84 J and 106/84 J filed by the defendants. Aggrieved over the said findings, the defendants filed AA.No.1/1990 and Appellate Authority reverse the order of the Land Tribunal and allowed the applications in O.A.N.105/84 J and O.A.No.106/84 J of the defendants. Challenging the same, the plaintiff preferred the revision in CRP.No.3043/1993 before this Court. Which dismissed the revision petition with the direction to seek remedy before the proper Court of pecuniary jurisdiction. The plaintiffs states that the suit property belongs to all the plaintiffs and the defendants and they are in joint possession. The earlier gift deeds in favour of the plaintiffs was not acted upon. As the plaintiffs are not interested in joint possession have come forward with the suit seeking partition of 3/5th share in the suit. Hence, the plaintiffs seeks to entertain the suit.

3.The case of the defendant is that the defendants did not sign in O.A.No.173/84 J application. The earlier Gift Deeds in favour of the defendants were acted upon and the final order passed in O.A.No.105/84 J and O.A.No.106/84 J are valid. The defendants did not give their consent for cancellation of the gift deed. The possession of the property is with the defendants from 11.04.1983. The gift deed in favour of the defendants were executed as per the wish and desire of said Chappila in 1993. The mutation of name in the revenue records was not effected due to objections raised by the plaintiffs. The claim of the plaintiffs that Chappila executed the cancellation deed and subsequent gift deed is not true and the said documents should have been created by the plaintiffs with the assistance of the first plaintiff's husband. The cancellation deed and subsequent gift deed could have been obtained when Chappila was not in a sound disposing state of mind. The defendants states that the plain reading of the cancellation deeds will show that the delivery of possession of the property was effected simultaneous, the execution of gift deed No.172/83 and 173/83 dated 11.04.1983. The defendants have purchased the land lords right also as per purchase certificate No.2/94 and 3/94 and perfected their title. The conclusion of the High Court in CRP.No. 3043/1993 does not given any right to the plaintiff to file a suit and the relief sought for by them. The plaintiff has come forward with the suit, the order passed in O.A.No.105/84 J and O.A.No.106/84 J has become final. The suit is barred by limitation. The Court fee paid is not correct. The plaintiffs are not in possession and they are liable to pay the Court Fee under Section 37(I) of Pondicherry Court Fee & S.V. Act. Thus, the defendants sought for dismissal of the suit.

4. Before the Trial Court, the plaintiffs examined P.W.1 and documents Ex.A1 to Ex.A7 produced to prove their claim. On the side of the defendants, they examined D.W.1 and produced documents Ex.B1 to Ex.B5. On the basis of the same, after contest, the trial Court dismissed the suit. Aggrieved upon that the plaintiffs preferred the first appeal before the lower appellate Court. After contest, the lower appellate Court allowing the appeal by setting aside the findings of the trial Court and decreed the suit. Aggrieved upon that the defendants preferred the second appeal.

5. At the time of admission, the following substantial question of law was framed by this Court for consideration.

1) Whether the Court below is right in reversing the well considered findings of the trial Court without giving effect to the provisions of Section 122 and 123 of the Transfer of Property Act that when once the gift is executed and accepted, the same cannot be revoked?

2. Whether the Court below is right in reversing the well considered findings of the trial Court without giving effect to Section 126 of the Transfer of Property Act that only under certain circumstances a gift can be revoked and otherwise the gift cannot be revoked?

3. Whether the Court below is right in reversing the well considered findings of the trial Court, without giving effect to the provision of Section 68 of the Indian Evidence Act that the necessity of examining the attesting witness will arise only in case of execution of the document by the person by whom it purports to have been executed is specifically denied?

6. The learned counsel appearing for the appellants/defendants would contend that the first appellate Court failed to consider the provisions under Sections 122 to 126 of Transfer of Property Act regarding the revocation of the gift deeds and gave a finding in contrary to the provisions under Section 126 of the Transfer of Property Act. The Courts below ought to have seen that Chattampally Chappila had gifted the property to the original defendants 1 and 2, namely, Chattampally Mathu and Chathampally Janu on 11.04.1983 under Ex.B2 and Ex.B3. The conclusion of the lower appellate is that Section 68 of the

Indian Evidence Act was not followed and on that ground reversed the finding of the trial Court. The said finding is not proper as the gift deed Ex.A2 and Ex.A3 are not denied by the plaintiffs and they admitted the same. As such, there is no need or necessity to prove the execution of the same. Thus, the conclusion of the lower appellate Court invoking Section 68 of the Indian Evidence Act and the finding given on that basis is unwarranted. It is also pointed out that the plaintiffs never pleaded fraud or misrepresentation in execution of Ex.A2 and Ex.A3. As such the conclusion of the lower appellate Court, on that ground also is not proper. The finding of the lower appellate Court that the gift deeds itself were not acted upon is not proper. The lower appellate Court also failed to see the gift deed executed cannot be cancelled unilaterally and the gift deed effected as per the recitals of the document and the cancellation deed Ex.A4 and Ex.A5 cannot be valid documents. Thus, the appellants contends that the reasoning of the first appellate Court to reverse the findings of the trial Court is not proper and the same is to be set aside.

7. Per contra, the learned counsel for the respondents would submit that the conclusion of the lower appellate Court is appropriate and the same is based on proper appreciation of oral and documentary evidence available on record. It is contended that there is no infirmity in the findings of the lower appellate Court. Thus, the respondents seek dismissal of the appeal.

8. I have heard the rival submissions and also perused the materials available on record.

9. On perusal, it is clear that one Chappilla executed the Gift Deeds Ex.A2 and Ex.A3. Subsequently, she had cancelled the same through Ex.A4 and Ex.A5 and executed fresh Gift Deed Ex.A6. That gave the cause of action for this suit. According to the defendants, Ex.A2 and Ex.A3 which was executed in their favour alone was prevail and the suit will not lie. Before going to the merits of the case, we have to see the relevant provisions Section 122 to 126 of the Transfer of Property Act relating to gift deed. Section 126 of the Transfer of Property Act, 1882 is as follows:-

"Section 126 When gift may be suspended or revoked. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A Gift may be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save at aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

ILLUSTRATIONS;

(a) A give a field to B, reserving to himself, with B's assent, the right to take back the field in case B or his descendants die before A. B dies without descendants in A's life time. A may take back the field.

(b) A give a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs.10,000 out of the lakh. The gift holds goods as to Rs.90,000, but is void as to Rs.10,000/- which continue to belong to A.

10. Thus, it is apparent that except to the circumstances stated therein Para 1 and 2, the gift cannot be revoked. It is also pointed out that once the Gift is accepted and in the absence of specific power of revocation, the settlement cannot be revoked except under the circumstances stated in Section 126 of the Transfer of Property Act. The learned counsel for the appellants/defendants relying upon the ruling reported in 2009 (5) CTC 558 in S.GANESAN Vs. BHARATHIRAJAN, contended that once settlement deed is accepted by the settlee then the settlement is completed and in the absence of power of revocation reserved for settler, the gift deed cannot be revoked unless it is permitted by the Court. In the said ruling, it is held as follows:-

"I have heard the learned counsel for the appellant as well as the respondent. It is seen from the records that the settlement deed has been executed by mere appeal in favour of the vendors of the defendant under Ex.B3. The settlement deed being a registered settlement deed and irrevocable there is no power vested with the said Balu to revoke the same under Ex.A57. Therefore, the Courts below have rightly held that the unilateral cancellation of the settlement deed by the said Balu is void since he did not have the title to the suit property. The Trial court has also referred with the specific Clause in the settlement deed. In pursuance to the settlement deed the defendant has purchased the suit

property under Ex.B5 dated 02.09.1992 which is registered sale deed. Therefore it is clear not withstanding the fact that the possession has not been handed over to donee under a settlement the same would not invalid the transaction. Similarly under Section 127 of the Transfer of Property Act, 1882 a minor is competent to accept a gift. As held earlier that the settlement itself makes it clear about the existence of the mortgage. It has been held in the Judgment reported in 2004 1 CTC 146 (K.Balakrishnan vs. K.Kamalam and others) that gift of title and ownership of property to the donee need not include actual possession and the minor is competent to accept the gift."

Likewise, another ruling reported in 2004 (1) CTC 146 in K.BALAKRISHNAN Vs. K.KAMALAM AND OTHERS, wherein it is held as follows:-

"In our considered opinion therefore, the trial court and the High Court were wrong in coming to the conclusion that there was no valid acceptance of the gift by the minor donee. Consequently, conclusion has to follow that the gift having been duly accepted in law and thus being complete, it was irrevocable under Section 126 of the Transfer of Property Act. Section 126 prohibits revocation of a validly executed gift except in circumstances mentioned therein. The gift was executed in 1945. It remained in force for about 25 years during which time the donee had attained majority and had not repudiated the same. It was, therefore, not competent for the donor to have cancelled the gift and executed a Will in relation to the property."

11.Following the above said ruling, if there is no reservation, it is clear that for revocation in the deed itself, the same cannot be revoked under the Court empowered to cancel the gift deed. In the case on hand, the settlor herself cancelled the gift deeds Ex.A2 and Ex.A3 through Ex.A4 and Ex.A5 and executed Ex.A6 new gift deed. Thus, pointing it out, it is contended by the learned counsel for the appellants/defendant that such unilateral cancellation is not permissible. In this case, in Ex.A2 and Ex.A3 deeds, there is no specific reservation for the settlor to allege cancellation of the settlement deed. In such situation, the cancellation of the deed unilaterally by another deed is against law. Hence, the trial Court negatived

the claim of the plaintiff, but the first appellate Court upheld the contention of the plaintiff on the ground that executed Ex.A2 and Ex.A3 deeds is not proved by the defendants as per Section 68 of the Indian Evidence Act. The first appellate Court held that mere of affixing signature or thumb impression will not amount to admission of execution, because misrepresentation and fraud is committed in this case in obtaining the signature of the executant. Thus, the Court below held that the admission of the signature in the document cannot be construed to be an admission of the execution of the document.

12.The Courts below also held that there is no oral evidence to show that Chappila fully understood the contents of Ex.A2 and Ex.A3 and thereafter sign in it. It is also held that she being an illiterate person and not well at that time of execution, the burden is on defendants to prove the execution was done properly, but they failed to do so. Thus, the learned counsel for the appellants/defendants contended that it is clear that the documents Ex.A2 and Ex.A3 was obtained by misrepresentation and fraud. In this aspect, the first appellate Court relied on a judgment reported in 1992 (2) Law Weekly, 209. On such basis, the first appellate Court reversed the finding of the trial Court on two grounds, viz., Ex.A2 and Ex.A3 document executed is not proved as per Section 68 of the Evidence Act and both Ex.A2 and Ex.A3 were executed on the basis of misrepresentation and fraud. The said conclusion is challenged by the defendant in this appeal. As such, it is to be seen whether the reasoning adduced by the first appellate Court for reversing the finding of the trial Court is correct on the basis of the pleadings and evidence on record has to be considered. In the plaint at page 2 para 3, it is stated as follows:- "when the desire was expressed by Chappilla, the husband of second defendant, Krishnan and son of first defendant, Dasan, agreed to arrange the execution of necessary documents, after making necessary consultation. Thus, the Chappila was taken to Registrar's Office by them and made to execute documents which Chappila was made believe that the documents executed are as she had desired and possession of property continued with Chappila." At page No.3 of plaint it is stated as follows:- "then only Chappila learned that she had been made to execute an out right gift deed without reserving right in herself and that the gift deeds only were in the name of defendants only." Thus, she protested against this. Eventually, on the intervention of mediators, plaintiffs, defendant's and their husbands, it was decided to cancel the above mentioned gift deeds and to execute a fresh gift deed in favour of all children and children of deceased Devi. Accordingly, earlier gift deeds were cancelled and fresh gift deeds were executed by Chappilla on 26.12.1983.

13.It is pointed out that in the plaint pleadings, the plaintiffs have nowhere stated that the defendants played fraud or misrepresentation and got execution of Ex.A2 and Ex.A3. However, it is pointed out that the first appellate Court gave a finding as if there was misrepresentation and fraud committed when Ex.A2 and Ex.A3 was executed. The said findings of the first appellate Court without any pleading regarding misrepresentation and fraud is unfounded and unwarranted and unsustainable. As far as Section 68 of the Evidence Act is concerned, the document concerned has to be proved through attester, scribe etc., As far as proof of Will is concerned, examining at least one attester is mandatory. Admittedly, Ex.A2 and Ex.A3 are not Wills, they are only gift deeds. The plaintiff themselves admitted not only in the pleadings, but also in their evidence that Chappila had executed gift deeds Ex.A2 and Ex.A3. Thus, there is no dispute with regard to execution of Ex.A2 and Ex.A3. The specific plea of the plaintiffs in Ex.A2 and Ex.A3 documents was not executed as desired by Chappila. It is not the case of the plaintiff is that Ex.A2 and Ex.A3 was not executed by Chappila. Therefore, the question of proof of execution of Ex.A2 and Ex.A3 will not arise and it is only such situation, the defendants have to prove the execution of Ex.A2 and Ex.A3 by invoking Section 68 of the Evidence Act. In this case, no such situation has arisen. Thus, there is no need or necessity to invoke Section 68 of the Evidence Act, but the first appellate Court unwarranted invoked Section 68 of the Evidence Act. On that basis, the Trial Court arrived at a correct conclusion with regard to the execution of Ex.A2 and Ex.A3 i.e., Ex.B2 and Ex.B3. In such situation, the findings of the first appellate Court has to be set aside and the findings of the trial Court that as per Section 126 of the Transfer of Property Act, Chappila has no right to revoke the gift deed executed by her in favour of the defendants, since there is no reservation in that document. If really the plaintiffs or the Chappila wanted to cancel the same, they ought to have approached the Court getting permission to cancel the gift deed executed by her as contemplated under Section 126 of the Transfer of Property Act and the revocation cannot be done by merely executing another registered gift deed. Therefore, this Court comes to a conclusion that the findings of the first appellate Court is against the provision Section 126 of the Transfer of Property Act and the same is unsustainable. Accordingly, I find that the appellants are the entitled to succeed in the appeal. Thus, the question of law raised in the appeal are answered in favour of the appellants. The point is answered accordingly.

14.In the result, the second appeal is allowed. No costs. The Judgment and decree dated 12.09.2013 made in A.S.No.103 of 2006 passed by the learned II Additional District Judge,

Pondicherry is hereby set aside and the decree and judgment of the trial Court is restored. Consequently, connected M.P. is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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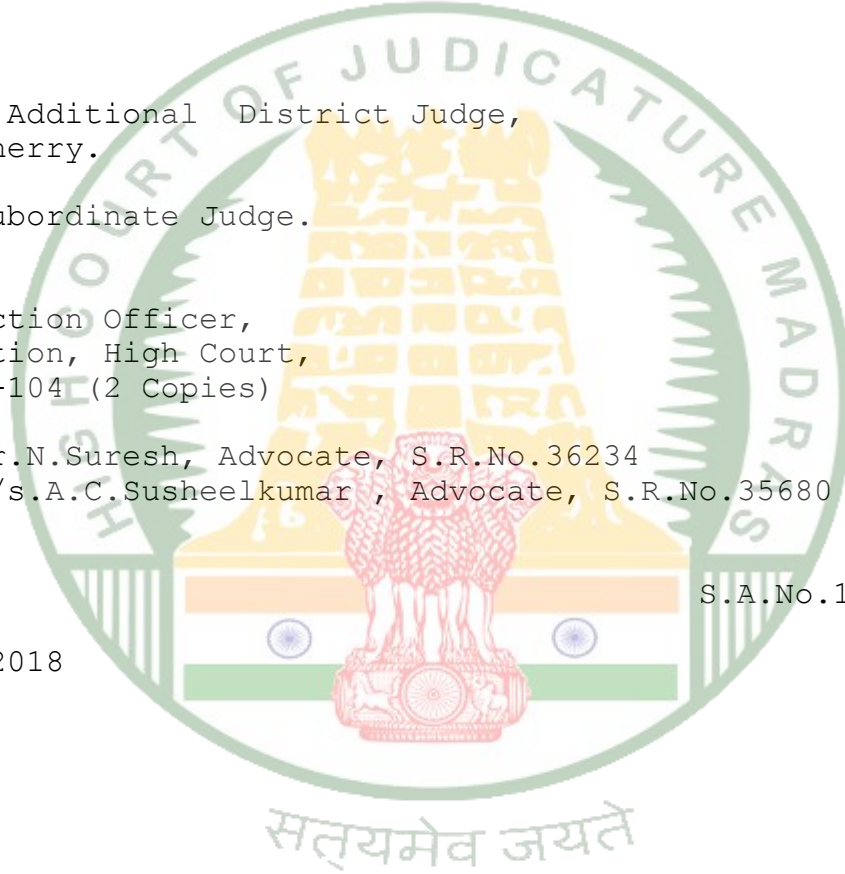
1. The II Additional District Judge,
Pondicherry.
2. The Subordinate Judge.
Mahe.
3. The Section Officer,
VR Section, High Court,
Madras-104 (2 Copies)

+2cc to Mr.N.Suresh, Advocate, S.R.No.36234

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