

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.04.2019

PRONOUNCED ON : 03.06.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.162 of 2007

and

M.S.No.1 of 2007

B.Kamala Ammal ...Appellant/Plaintiff

Vs.

1. Saroja @ Padmavathy
2. Kumudha
3. R.Rathnambal
4. V.Parthasarathy Naidu ...Respondents/Defendants

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 10.01.2006 passed in A.S.No.4 of 2005 on the file of the Additional Sub Court, Tiruvannamali in confirming the judgment and decree dated 06.10.2004 passed in O.S.No.706 of 1996 on the file of Additional District Munsif Court, Chengam.

For Appellant : Mr.P. Mani

For Respondents: Mr.T.M.Naveen
for M/s.D.Kamatchi for R1
R4 - Given up.
R2 & R3 - No appearance. Set exparte
vide order dated 11.04.2019
R4 - Given up.

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 10.01.2006 passed in A.S.No.4 of 2005 on the file of the Additional Subordinate Court, Tiruvannamali confirming the judgment and decree dated 06.10.2004 passed in O.S.No.706 of 1996 on the file of Additional District Munsif Court, Chengam.

2. The second appeal has been admitted on the following substantial questions of law.

A) Whether the Courts below erred in law in

holding that the first defendant is entitled to 1/3 share in addition to her 1/2 share on the basis of Ex.B8 settlement deed without proving the validity and genuineness of Ex.B8 settlement deed merely because the same was marked without any objection in the earlier suit O.S.No.121 of 1973 when in fact the plaintiff is not a party to the said suit and when the validity and genuineness of the said settlement deed was not at all decided in the said earlier suit?

- B) Whether the courts below erred in law in holding that the plaintiff is not entitled to question the validity of Ex.B8 settlement deed as if she did not take any step to cancel or challenge the same within the prescribed time when the plaintiff did not admit the validity and genuineness of Ex.B8 settlement deed and moreover it is for the first defendant who claim under Ex.B8 settlement deed to prove the validity and genuineness of the same in accordance with law?
- C) Whether the courts below erred in law in holding that the plaintiff is estopped from disputing 2/3 share claimed by the first defendant as if the plaintiff herself, admitting the first defendant's 2/3 share, purchased the first defendant's 2/3 share in S.No.19/1 under Ex.B1 sale deed when in fact under E.B1 sale deed the plaintiff purchased only 1/2 share and not 2/3 share from the first defendant?
- D) Whether the judgment and decree passed by the courts below are sustainable in law when the same are perverse and contrary to the evidence on record?"

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

5. Suffice to state that the plaintiff has laid the suit against the defendants for partition.

6. It is not in dispute that the suit properties originally belonged to Varadarajulu Naidu, the father of the plaintiff and the first defendant. According to the plaintiff, Varadarajulu Naidu died in the year 1963 leaving behind the suit properties to be succeeded by his legal heirs, namely, his wife, Silakavathy Ammal and his two daughters, namely, the plaintiff and the first defendant. Further according to the plaintiff, Silakavathy Ammal, the mother, had died intestate in the year 1988 leaving behind the plaintiff and the first defendant as her legal heirs and thus according to the plaintiff, she is entitled to the half share in the suit properties and inasmuch as the first defendant is attempting to alienate some of the items of the suit properties as if the same belong to her absolutely, it is stated that the alienation made by the first defendant in favour of the third parties is not valid and not binding upon the plaintiff and accordingly, as the first defendant had not come forward to effect the division of the suit properties and allotted the share to which the plaintiff is entitled to despite the issuance of the notice and on the other hand, refuted the claim of the plaintiff putting forth untenable allegations, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

7. The first defendant resisted the plaintiff's suit contending that the suit properties originally belonged to their father - Varadarajulu Naidu. According to her, the mother Silakavathy Ammal did not die intestate and on the other hand, it is stated that Silakavathy Ammal had settled her share in the suit properties i.e. 1/3 share in the suit properties in favour of the first defendant by way of the settlement deed, duly registered, dated 02.07.1970 and thus according to the first defendant, by way of the abovesaid settlement deed she is entitled to 2/3 share in the suit properties and the plaintiff is entitled to obtain only 1/3 share in the suit properties and accordingly it is also put forth by the first defendant that she had alienated the properties in favour of the others as detailed in the written statement and further according to the first defendant, accepting her entitlement to the suit properties, as above referred to, it is put forth that the plaintiff had purchased the properties from the first defendant recognising her 2/3 share in the suit properties and further it is pleaded by the first defendant that the plaintiff and the first defendant had also divided the properties orally during the year 1972, whereunder, the plaintiff had been allotted 1/3 share and the first defendant had been allotted 2/3 share and accordingly prayed that the plaintiff is not entitled to obtain the relief as prayed for in the suit.

8. Based on the materials placed on record, the courts below were pleased to declare that the plaintiff is entitled

to 1/3 share in the suit properties by upholding the settlement deed dated 02.07.1970 projected by the first defendant for claiming the 2/3 share in the suit properties. Impugning the same, the present second appeal has been preferred.

9. The main point that has to be adjudicated in the second appeal is whether the settlement deed dated 02.07.1970 relied upon by the first defendant for claiming the 2/3 share in the suit properties is true, valid and binding upon the plaintiff.

10. As abovestated, it is not in dispute that the suit properties originally belonged to Varadarajulu Naidu, the father. Varadarajulu Naidu is succeeded by his wife Silagapathy Ammal, his daughters, namely, the plaintiff and the first defendant. It is thus found that his wife and the two daughters, each would be entitled to the 1/3 share in the family properties. Now, according to the first defendant, Silagavathy Ammal had settled her 1/3 share in the suit properties in her favour by way of the settlement deed dated 02.07.1970 marked as Ex.B8, the certified copy of the abovesaid settlement deed has been marked as Ex.B4. The plaintiff is disputing the truth and validity of the abovesaid settlement deed. According to the plaintiff, the abovesaid settlement deed had been brought up or fabricated by the first defendant for defeating the lawful share of the plaintiff in respect of the suit properties. In the light of the abovesaid position, it is for the first defendant to establish the truth and validity of the settlement deed dated 02.07.1970.

11. To sustain the truth and validity of the settlement deed dated 02.07.1970, the first defendant has examined the attestors of the same as D.Ws.2 and 3. At the first instance, on behalf of the first defendant, only the certified copy of the abovesaid settlement deed had been marked as Ex.B4. Accordingly, it is found that D.Ws. 2 and 3, the attestors to the same, had tendered evidence only with reference to the certified copy of the settlement deed pointed out to them for consideration. Accordingly, it is found that D.W.2, during the course of cross examination, has admitted that inasmuch as he has not been shown the original settlement deed, he is unable to assert whether his signature is available in the settlement deed and his evidence being above, it is found that as rightly put forth by the plaintiff's counsel, his evidence, cannot be taken for upholding that the settlement deed had been duly executed by Silagavathy Ammal and that it is attested by D.W.2 as per law. Furthermore, according to the plaintiff, D.W.2 is not Narayanan as claimed by him and he is some other person and therefore, the plaintiff has even challenged the identity of D.W.2. Despite the same, D.W.2 has not placed any material or the first defendant has not placed

any material to safely conclude that he is Narayanan, Son of Munusamy and it is he who had attested the settlement deed marked as Ex.B8. Therefore, the evidence of D.W.2 cannot be safely accepted for upholding the truth and validity of Ex.B8 settlement deed.

12. Even the other attesor, Ramasamy, Son of Arunachala Gounder, has been shown only the certified copy of the settlement deed marked as Ex.B4. However, he would claim that it is he who had attested the original of the same. However, when the original settlement deed had not been shown to him, it does not stand to reason as to how he could assert and tender positive evidence that he has attested the settlement deed. When he he was confronted with the abovesaid position, he would claim that he has tendered the evidence based on his memory. Accordingly, it is found that D.W.3 has also not been able to assert that it is he who had attested Ex.B8 settlement deed, particularly, when the abovesaid document had not been shown to him and he would claim to have attested the settlement deed on 02.07.1970 based on his memory. Even with reference to D.W.3, challenge has been made by the plaintiff that he is not Ramasamy, Son of Arunachalam and despite the above position, there is no material placed either by D.W.3 or on the part of the first defendant to safely conclude that he is Ramasamy, Son of Arunachalam and it is he who had attested the settlement deed dated 02.07.1970.

13. In the light of the abovesaid position, when the evidence tendered by D.Ws. 2 and 3 had not satisfied the meaning of attestation as contemplated under law and when in particular, they have not been shown the original settlement deed and questioned about their attestation with reference to the same, in such view of the matter, merely on the production of Ex.B4 and the evidence tendered by D.Ws. 2 and 3 on the basis of the same with reference to their alleged attestation, as contended by the plaintiff's counsel, would not satisfy the requirements of law for proving the valid attestation as contemplated under law and accordingly, it is found that the courts below had erred in accepting the truth and validity of Ex.B8 settlement deed only based upon the abovesaid unacceptable and unreliable evidence of D.Ws.2 and 3.

14. As rightly contended, the first defendant should have endeavoured to again summon the abovesaid witnesses and invite them to tender evidence by confronting them with the original settlement deed Ex.B8. However, the first defendant had not endeavoured to carry on the said exercise for the reasons best known to her. As of now, the position remains that there is no acceptable and convincing evidence on the part of the first defendant that Ex.B8 settlement deed had been duly executed by Silagavathy ammal and attested by the witnesses as per per law.

15. Materials placed on record go to show that the mother Silagavathy Ammal, the plaintiff and the first defendant had settled certain properties belonging to the family in favour of the plaintiff's sons by way of the settlement deed dated 11.03.1965 marked as Ex.B7. Seeking title and interest of the said properties covered under the settlement deed dated 11.03.1965, it is found that the plaintiff's sons represented by their father Babu Naidu had levied the suit against the first defendant, Silagavathy Ammal and others seeking for the reliefs of declaration, possession and permanent injunction in O.S.No.121 of 1973. As could be seen from the materials available on record, their case was upheld by the trial court and the first appeal preferred against the same has been dismissed and even the second appeal preferred by the first defendant and Silagavathy Ammal in Second Appeal No.969 of 1981 has also been dismissed. It is thus found that the settlement deed dated 11.03.1965 executed in favour of the plaintiff's sons had been upheld by this court and therefore, it is seen that thereafter, neither Silagavathy Ammal nor the first defendant, even the plaintiff as the case may be, would be entitled to deal with the properties covered in the abovesaid settlement deed. On the other hand, as rightly contended by the plaintiff's counsel, on a perusal of Ex.B8 settlement deed, it is found that nearly 15 items of the properties covered in the settlement deed dated 11.03.1965 had been included in the settlement deed dated 02.07.1970 marked as Ex.B8 and there is no plausible explanation on the part of the first defendant as to how the said properties had come to be included in Ex.B8 settlement deed by Silagavathy Ammal. The abovesaid factors alone, throw a serious suspicion in the genuineness of the settlement deed Ex.B8 said to have been executed by Silagavathy Ammal in favour of the first defendant. It is thus noted that Silagavathy Ammal had settled the properties, not belonging to her, in favour of the first defendant by way of Ex.B8 settlement deed and when as above noted, the first defendant has also failed to establish the truth and validity of Ex.B8 settlement deed as per law and furthermore, when there is no acceptable and reliable material to hold that the first defendant through Ex.B8 settlement deed had derived the legal right to the suit properties to an extent of 2/3 share in the same and enjoying the same as such, it is found that, in all, as put forth by the plaintiff, Ex.B8 settlement deed is not a true and valid document and accordingly the first defendant is not entitled to challenge the claim of the half share of the plaintiff in respect of the suit properties as put forth in the plaint.

16. In addition to that, when Ex.B8 settlement deed is found to be executed in respect of the undivided family properties belonging to the family members, as contended, when no settlement could be effected in respect of the joint family

properties in favour of the other family members or a stranger without the consent of the other family members / coparceners and when it is further noted that the plaintiff had not given her consent for the settlement deed marked as Ex.B8, in the light of the principles of law outlined in the decisions reported in (2003) 1 MLJ 145 (Kanna Gounder and another vs. Arjuna Gounder, (2008) 7 MLJ 903 (S.C) (Baljinder Singh vs. Rattan Singh) and (1987) 3 Supreme Court Cases 294 (Thamma Venkata Subbamma (dead) by Lr. vs. Thamma Rattamma and others), it is found that the settlement deed date 02.07.1970 in respect of the joint family properties, even assuming the same to be true, is wholly invalid and not binding upon the plaintiff as per law.

17. The first defendant would claim that the plaintiff had purchased 2/3 share in respect of the family properties belonging to the first defendant by way of Ex.B1 sale deed and on that basis, it is contended that the plaintiff is aware of the entitlement of the first defendant's 2/3 share in the suit properties under Ex.B8 settlement deed. However, as rightly contended by the plaintiff's counsel, when it is found that, as per the materials available on record, the father Varadarajulu Naidu is entitled to only 61 cents in survey No.19/1 and when by way of Ex.B1 sale deed, the plaintiff has purchased only the half share from the first defendant, the contention of the first defendant that the plaintiff had obtained 2/3 share from her by way of Ex.B1 sale deed, as such, cannot be countenanced. In this connection, as rightly put forth by the plaintiff's counsel, it is found that the father is entitled to only 61 cents in survey No.19/1 and out of the same, only the half share had been purchased by the plaintiff under Ex.B1 and the same had also been admitted by the first defendant in the course of evidence. Therefore, the case of the first defendant that the plaintiff is estopped from disputing her entitlement of 2/3 share in the suit properties on the basis of Ex.B1 sale deed does not merit acceptance.

18. Though the first defendant would plead that an oral partition had been effected between the plaintiff and her during the year 1972, whereunder, the plaintiff had been allotted 1/3 share and she had been allotted 2/3 share, the first defendant during the course of cross examination has admitted that no partition had been effected between them at the time when the defendant's settlement deed was effected and even subsequent thereafter. Furthermore, there is no material placed on the part of the first defendant evidencing that the partition had already been effected orally between the plaintiff and the first defendant in respect of the suit properties. Therefore, the plea of partition projected by the first defendant cannot be sustained.

19. The argument has been put forth by the first defendant's counsel that in the earlier suit between the parties in O.S.No.121 of 1973 itself the settlement deed dated 02.07.1970 had been projected and though the plaintiff being aware of the same, having not thrown any challenge to cancel the said settlement deed, according to the first defendant, the plaintiff is not entitled to dispute the same and hence the plaintiff's case should not be accepted. No doubt, the settlement deed dated 02.07.1970 had been projected in O.S.No.121 of 1973, however, it is to be noted that the plaintiff is not a party to the abovesaid suit proceedings. But, according to the first defendant, the plaintiff has been examined as a witness in the abovesaid suit proceedings. Be that as it may, the plaintiff has not admitted the truth and validity of Ex.B8 settlement deed and on the other hand, according to the plaintiff, the same had been created or forged by the first defendant to divest her claim of 1/2 share in the suit properties. When the plaintiff has impugned the abovesaid settlement deed and furthermore, when the plaintiff is not a party to the abovesaid settlement deed, in such view of the matter, there is no need on the part of the plaintiff to cancel the same as sought to be projected by the first defendant. Furthermore, on a perusal of the judgment passed in O.S.No.121 of 1973, though the issue had been formulated in the abovesaid suit as regards the truth and validity of the settlement deed dated 02.07.1970 as the third issue, in the judgment rendered in the abovesaid suit marked as Ex.A4, it is found that the abovesaid issue had not been answered by the court concerned and accordingly under issue no.3, the court had held that as no argument was advanced on the said issue, no finding would arise with reference to the same. It is thus noted that though Ex.B8 settlement deed was put at issue in O.S.No.121 of 1973, however, when the abovesaid suit was mainly focusing only on the truth and validity of the settlement deed 11.03.1965 and not the settlement deed dated 02.07.1970, it is found that the parties, thereto, had not adduced evidence with reference to the same nor placed arguments in connection with the same and accordingly the issue formulated with reference to the said deed had not been answered by the court concerned, in such view of the matter, the argument put forth by the first defendant that the plaintiff despite having the knowledge of the settlement deed dated 02.07.1970, had not thrown any challenge to the same and therefore, she is estopped from challenging the same, as such, cannot be countenanced, particularly, when it is found that the plaintiff is not the party to the same and the plaintiff is not accepting the truth and validity of the same and on the other hand, all along, been challenging the same tooth and nail. In the light of the abovesaid position, the argument projected by the first defendant's counsel that the plaintiff is not entitled to challenge the settlement deed without seeking to cancel the same, as such, cannot be sustained.

either on factual matrix or on the legal aspects and accordingly the same is rejected.

20. In the light of the abovesaid discussions, it is found that the courts below, without appreciating the materials placed on record, both oral and documentary, had erred in accepting the defence version and upholding the truth and validity of Ex.B8 settlement deed, without any reliable and convincing material pointing to the same, and also without appreciating the other aspects of the matter as above discussed and the principles of law governing the same and in such view of the matter, the judgment and decree of the courts below accepting the defence version for declaring only 1/3 share of the plaintiff in respect of the suit properties is found to be illogical and irrational and also vitiated and suffering from perversity and in such view of the matter, the judgment and decree of the courts below cannot be upheld and the substantial questions of law formulated in this second appeal are accordingly answered in favour of the plaintiff and against the defendants.

21. In view of the above, the judgment and decree dated 10.01.2006 passed in A.S.No.4 of 2005 on the file of the Additional Subordinate Court, Tiruvannamali confirming the judgment and decree dated 06.10.2004 passed in O.S.No.706 of 1996 on the file of Additional District Munsif Court, Chengam are set aside and modified and accordingly the plaintiff is held to be entitled to the 1/2 share in the plaint schedule properties and accordingly there shall be a preliminary decree in favour of the plaintiff as prayed for. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar(CS-IV)

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Sub Assistant Registrar

bga

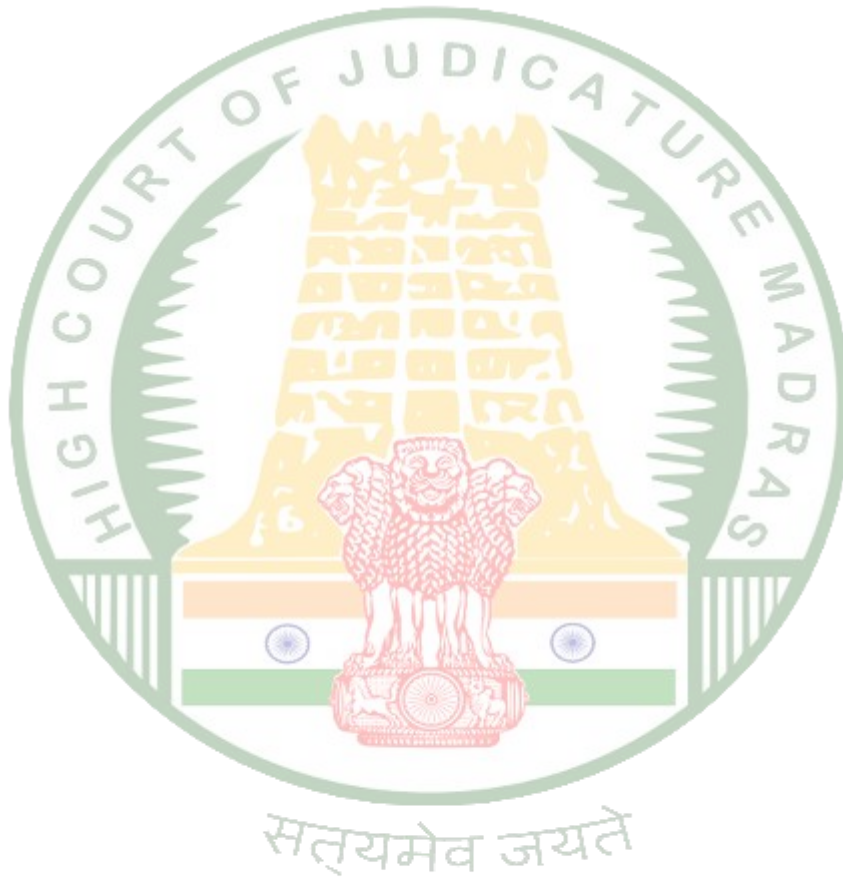
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S.A.No.162 of 2007

PA (CO)
CB (09/03/2020)



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