

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.02.2019

CORAM:

THE HONOURABLE Mr.JUSTICE R.PONGIAPPAN

S.A.No.392 of 2007

[Judgment Reserved on 23.01.2019]

Florence Lobbs Appellant / Plaintiff

Vs.

Paul Fernandez ... Respondent / Defendant

PRAYER: Appeal filed under Section 100 of Civil Procedure Code, against the Judgment and Decree of the learned Sixth Additional Judge, City Civil Court, Chennai in A.S.No.217 of 2004, dated 24.02.2005, confirming the judgment and decree passed by the learned 1 Assistant Judge, City Civil Court, Chennai in O.S.No.935 of 1999, dated 21.10.2002.

For Appellant : Mr. V.Perumal

For Respondent : No Appearance

JUDGMENT

The unsuccessful plaintiff before the Courts below is the appellant herein. This Appeal is directed against the Judgment and Decree of the learned Sixth Additional Judge, City Civil Court, Chennai, dated 24.02.2005, confirming the Judgment and Decree passed by the learned First Assistant Judge, City Civil Court, Chennai in O.S.No.935 of 1999, dated 21.10.2002.

2. Before the learned I Assistant Judge, City Civil Court, Chennai, the appellant filed a Suit in O.S.No.935 of 1999, for the relief of declaration, declaring that the settlement deed, dated 09.12.1987, registered as Document No.126/1988, on the file of the Sub-Registrar, Kodambakkam, is valid and binding on the defendant and for the relief of consequential permanent injunction restraining the defendant, his servants, agents, and

persons claiming through him from interfering with the peaceful possession and enjoyment of the suit property or causing loss and alteration to the property and further relief of costs.

3. The learned 1 Assistant Judge, Chennai, by Judgment and Decree, dated 21.10.2002, dismissed the Suit with costs. Aggrieved by the same, the appellant herein had filed an appeal in A.S.No.217 of 2004, on the file of the learned VI Additional Judge, City Civil Court, Chennai, by the Judgment and Decree, dated 24.02.2005, by confirming the Judgment and Decree passed by the 1 Assistant Judge, City Civil Court, Chennai and dismissed the appeal. Feeling aggrieved, the appellant / plaintiff has filed the present Second Appeal.

4. For the sake of convenience, the parties are referred to herein, as per their ranking in the Suit.

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

The plaintiff is the absolute owner of the suit property acquired by her, by a registered settlement deed, dated 09.12.1987, executed by her mother, in her favour. Her husband is a seamen on duty on high seas. The defendant is the brother of the plaintiff. Both the plaintiff and the defendant are living in the same house, particularly, the defendant is in the ground-floor of the suit premises, as a tenant, under the plaintiff. In 1988, the plaintiff filed R.C.O.P.No.1624/1988, for the relief of evicting the defendant. In the above said proceedings, the stand of the plaintiff is, she is the owner of the property. The Rent Controller held that the defendant is the tenant and eviction was ordered. In appeal in R.C.No.458/1994, the order passed by the Rent Controller was upheld. However, in C.R.P.No.458 of 1994, this Court held that the Rent Controller has no jurisdiction to decide the ownership of the property and directed the parties to prove the title through filing of the suit. In view of the above findings of this Court, the plaintiff has approached the learned first Assistant Judge, Chennai, by filing the Suit.

6. Resisting the claim made by the plaintiff, the defendant denied all allegations levelled in the plaint. The plaintiff is not the absolute owner of the suit property. The settlement deed, dated 09.12.1987, registered as Document No. 126/1988, on the file of Sub Registrar, Kodambakkam is void and unenforceable in Law. The averment that the plaintiff maintained her parents for long time is a false one. The father of the plaintiff and defendant, who is one and the same person, died on 26.10.1977. The mother of the defendant lived with his

father for long time and died on 10.08.1971. The mother of the plaintiff was not a legally wedded wife of the father of the defendant. She was a concubine for his father and in that capacity begot 13 children, including the plaintiff. Therefore, the plaintiff is the consanguine sister of the defendant. The father of the defendant married the mother of the plaintiff on 11.11.1971, at the age of 86. At the time of marriage, the age of the mother of the plaintiff was 65 years. She was a Christian, known as Anthoniammal. On 20.01.1953, when the father made a settlement, by Document No.125/1953, the mother of the plaintiff was not the wife of the father of the defendant. The settlement deed in favour of the mother of the plaintiff is invalid and unenforceable in Law. In the settlement deed, it has been stated that the mother of the plaintiff was the wife of the father of the defendant. Therefore, the settlement deed is void abinitio. Since the settlement deed, in favour of the mother of the plaintiff, is void and she acquired no title under it, the settlement by the mother of the plaintiff itself is invalid and the plaintiff acquired no right under it. The defendant was born and brought up in the suit property. Till filing the suit, he is in the suit property, as a title holder of the suit property. At any point of time, the defendant was out of possession. Even though the revenue records pertaining to the suit property reflects that the mother of the plaintiff is the owner of the property, both the plaintiff and the defendant inherited a share each in the property. The suit property is under the joint possession of the plaintiff, defendant and other legal heirs. The suit is barred by limitation. The plaintiff is not filed the suit for evict the defendant from the suit property. According to the defendant, the suit is liable for dismissal.

7. Based on the above said pleadings, the learned First Assistant Judge, Chennai, has framed necessary issues and tried the Suit. During the trial, on the side of the plaintiff, she examined herself as P.W.1 and exhibited 8 documents, as Exs.A1 to A8. On the side of the defendant, the defendant himself examined as D.W.1 and 14 documents were marked as Exs.B1 to B14.

8. While admitting the Second Appeal, this Court has formulated the following Substantial Questions of Law, for consideration:-

"1. Whether the self-acquired property can be settled in favour of anybody?

2. Whether such settlement is hit by Section 6(h) of the Transfer of Property Act or not?

9. Before this Court, when this appeal was listed, the

learned counsel appearing for the respondent is not appeared and submitted his case. Even after giving sufficient opportunity, particularly, after posting the Second Appeal under the caption, 'for orders', no Advocate had entered appearance on behalf of respondent. Hence, without any alternative, this Court heard the arguments advanced by the learned counsel appearing for the appellant and passed the following Judgment.

10. The learned counsel appearing for the appellant would contend that the suit schedule property initially belongs to one P.M.Fernandez. The mother of the defendant Veronica is his first wife. Further, the mother of the plaintiff Anthoniammal is his second wife. Accordingly, the plaintiff and the defendant are the sister and brother respectively. Before the death, the Late P.M.Fernandez had executed a settlement deed, in favour of Anthoniammal, under Ex.A1. The said settlement deed / Ex.A1 was registered on 20.01.1953. Since the said property is a self-acquired property of P.M.Fernandez, the defendant is not having any right and title over the suit property. In the said circumstances, on 26.10.1987, the father of plaintiff and defendant P.M.Fernandez passed away. Subsequently, on 09.12.1987, the mother of the plaintiff Anthoniammal had executed a settlement deed, in favour of the plaintiff, under Ex.A1. Under the said circumstances, since the suit schedule property is the absolute property of P.M.Fernandez, he is having all rights to dispose the said property in favour of any one. Accordingly, on 20.01.1953 itself, he settled the property in favour of mother of the plaintiff. Thereafter, the property is in the hands of Anthoniammal and consequentially, she had also executed a settlement deed in favour of the plaintiff. But, without considering those aspects, the Courts below, without framing sufficient issues, in respect of the dispute arose in this case, had dismissed the suit with costs. Since in the settlement deed itself it was mentioned that the said Anthoniammal is the wife of deceased P.M.Fernandez, there was no question whether the said Anthoniammal is a concubine and the marriage had happened between P.M.Fernandez and Anthoniammal is voidable. Accordingly, the learned counsel prayed to allow the appeal.

11. In this appeal, it is an admitted fact that the plaintiff is born to P.M.Fernandez through one Anthoniammal. On the other hand, the defendant is born to P.M.Fernandez through one Veronica. As per the case of plaintiff, both the plaintiff and defendant were residing in the said premises. Before filing the suit, the very same plaintiff filed a petition before the Rent Controller, for the relief to evict the defendant from the suit premises stating that the defendant is a tenant. In final, this Court had directed the plaintiff to file a suit for proving his title, then only, he filed the suit before the learned First

Assistant Judge, for the relief as stated supra. Those facts are admitted by either side. Now it is not necessary to verify the genuineness of Exs.B1 to B9 and B12 to B14. Further, Exs.A to A8 have also disclosed the particulars of previous litigations made between the plaintiff and defendant.

12. The first stand taken by the defendant in the written statement is, the settlement deed, dated 09.12.1987, executed in favour of the plaintiff, by his mother, now marked as Ex.A2, is void abinitio, unenforceable in law, and forged one. In the said circumstances, since the defendant takes a specific plea, it is his duty to prove that the settlement deed, dated 09.12.1987 is a forged one. But, in this case, in order to prove the same, he has not produced and let in any evidence by saying that the settlement deed is void abinitio and forged one.

13. At this juncture, it is relevant to refer Section 6(h) of Transfer of Property Act, which reads as follows:-

6(h). No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) 6[for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872 (9 of 1872)], or (3) to a person legally disqualified to be transferee."

14. Now applying the said Section with the case on hand it is necessary to see whether the settlement deed, dated 20.01.1953, executed by P.M.Fernandez, in favour of mother of the plaintiff, is against the nature of the interest and the same is unlawful and forbidden by any other law.

15. The case of the defendant is that, since the mother of the plaintiff is a concubine to P.M.Fernandez, without any marriage executing a settlement deed in her favour, is illegal. In the said circumstances, it is to be noted that in the settlement deed (Ex.A1), the deceased P.M.Fernandez has specifically stated that the settlee is the wife of settlor. Further it has been specifically stated that the property in question is a self acquired property of P.M.Fernandez. Since the said document was executed in the year 1953, as per Section 90 of Indian Evidence Act, it shall be presumed that the said document is the genuine one.

16. In attacking the said document, no evidence was produced on the side of the defendant that the mother of the plaintiff is concubine to the deceased P.M.Fernandez. But on the other hand,

before the trial Court, the Baptism Certificate of the plaintiff was marked as Ex.A6. In the said Certificate it was mentioned that Anothoniammal is the wife of P.M.Fernandez, who is the father of the plaintiff as well as to the defendant. Only in the said capacity, the settlement deed, had been executed by the father of the plaintiff in favour of his wife. So, we cannot come to the conclusion that the nature of relationship with the mother of the plaintiff and the deceased P.M.Fernandez is against the nature and accordingly, the settlement deed, executed before 30 years, is not forbidden by any Law. In the said circumstances, it is useful to refer the judgment of the Hon'ble Supreme Court in Dwarampudi Nagaratnamba v. Kunuku Ramayya and another reported in [AIR 1968 SC 253], wherein it has been held as follows:-

"Venkatacharyulu was free to make a gift of his own property to his concubine. The gifts, under Exs.A-1 and A-2 were not hit' by Section 6 (h) of the Transfer of Property Act.

17. Furthermore, in an unreported Judgment of High Court of Kerala at Ernakulam, in Jane Antony vs. V.M.Siyath made in M.A.C.A.No.1324 of 2004, dated 25.09.2008, it has been held as follows:-

"We are of the strong view that all illegitimate children, though born out of wedlock, are children born to a man and woman who cohabited for some time and are in substance husband and wife for all purposes. Therefore, we have no hesitation in holding that the two children born to deceased through RW.1, namely, respondent Nos. 4 and 5, are legitimate children entitled to succeed to the estate of deceased Dr.Antony."

18. In view of the principles laid down by the Hon'ble Apex Court in the Judgment reported in [AIR 1968 SC 253] (cited supra) and the Judgment of the Kerala High Court in Jane Antony's case (cited supra), even assuming the stand taken by the defendant that the mother of the plaintiff is a concubine to the father of the defendant, since the property executed in favour of the mother of the plaintiff is a self acquired property of P.M.Fernandez, the settlement deed executed in favour of the mother of the plaintiff, under Ex.A1, is valid under Law and not hit by Section 6(h) of Transfer of Property Act. The Courts below, without considering the said aspect dismissed the suit. Therefore, without any hesitation I hold the settlement deed, dated 09.12.1987, executed by the mother of

the plaintiff in her favour, registered, as Document No.126/1988, on the file of Sub Registrar, Kodambakkam, is valid and binding on the defendant.

19. Insofar as the relief of injunction is concerned, the case of the plaintiff is that the defendant is residing in the ground floor, as a tenant, from time immemorial. No document was produced on the side of the plaintiff for proving that the defendant is the tenant. Since the possession is admitted by the plaintiff, it is for the plaintiff to file a separate suit, for recovery of possession against the defendant. Accordingly, the plaintiff is permitted to file a separate suit against the defendant for recovery of possession alone. Since the possession of the defendant is admitted by the plaintiff, the relief of injunction cannot be granted at this time. The Substantial Questions of Law are answered accordingly.

20. In the result, the second Appeal is partly allowed, to the extent indicated above. However, there shall be no order as to costs.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

MPK

To

1.The 6th Additional Judge,
City Civil Court,
Chennai.

2. The 1 Assistant Judge,
City Civil Court,
Chennai.

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

+1 cc to Mr.V.Perumal, Advocate, Sr.No. 14213

Judgment made in
S.A.No.392 of 2007

NMI (CO)
CSL/31.05.2019