

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 16.08.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A. No.3667 of 2012
and M.P. No.1 of 2012

R.Sivakamasundari

.. Appellant

vs

1.S.T.Nehru

2.Govindarasu

.. Respondents

Prayer: Civil Miscellaneous Appeal filed under Order 43 Rule 1 read with Section 104 of the C.P.C. against the order and decretal order dated 15.09.2012 made in E.A. No.135 of 2010 in E.P. No.19 of 2008 in O.S. No.39 of 1998 on the file of the Court of the District Judge at Karaikal.

For Appellant : Ms.G.Shabnam for
Mr.K.P.Jotheeswaran

For respondents: Mr.S.Sounthar for R1
No appearance for R2

JUDGMENT

R.Sivakamasundari, the appellant herein has come to this Court challenging the correctness of the decretal order dated 15.09.2012 passed in E.A. No.135 of 2010 in E.P. No.19 of 2008 in O.S. No.39 of 1998 on the file of the District Judge at Karaikal.

2.Learned counsel appearing for the appellant would submit that one Viruthachalam Pillai was the owner of ancestral property measuring to an extent of 32 kuzhies and also the owner of self acquired property to an extent of 30 kuzhies and he had executed a release deed in the year 1979 in favour of his brothers, namely, Chidambaram Pillai, Sowrirajan Pillai and Govindarasu Pillai in respect of his own property and therefore, the said Viruthachalam Pillai was the owner of 62 kuzhies in

total. According to the learned counsel appearing for the appellant, the paternal uncle of the appellant herein, by virtue of a Notarial Sale deed dated 09.10.1952, was in possession and enjoyment of the suit property. Therefore, the right or title over self acquired property cannot be given in release and the Release Deed said to have been executed in favour of his above said brothers is not valid in law. The above Viruthachalam Pillai had entered into a Sale Agreement dated 28.05.1999 with one Ramachandran in respect of the suit property and the same was duly registered with the office of the Sub Registrar, Neravy. By the said sale agreement, Viruthachalam Pillai had received a sum of Rs.20,000/- on 28.05.1999 and Rs.15,000/- on 08.09.1999 from Ramachandran as advance for the said transaction, but due to some other reasons, the sale transaction could not be completed. As requested by the said Viruthachalam, the appellant has repaid the advance amount of Rs.35,000/- and the same was duly registered with the office of the Sub Registrar, Neravy and thereafter, the second respondent has been in possession and enjoyment of the suit mentioned property.

3.Concluding her argument, learned counsel appearing for the appellant would submit that a fraud has been played on the appellant and she is always entitled to challenge the execution proceedings that has taken place behind her back. This has been completely over looked by the Court below. When the appellant has been in possession of the property, the property in question ought not to have been made as a subject matter of the mortgage deed. When the appellant has repaid the advance amount of Rs.35,000/- as requested by the said Virudachalam Pillai vide receipt dated 10.06.2003 and the same has been duly registered before the Sub Registrar, Neravy and since then the appellant has been in peaceful possession and enjoyment of the suit property, the impugned order passed in E.A. No.135 of 2010 ordering removal of obstruction caused by the appellant is liable to be set aside.

4.In support of her claim, by placing judgment dated 07.03.2007 passed in Civil Appeal Nos.5097-99 of 2004 (A.V.Papayya Sastry and others vs. Government of A.P. and others) reported in 2007 4 SCC 221, learned counsel would submit that it is well settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law and hence the same has to be treated as non-est and nullity.

5.Opposing the above prayer, learned counsel appearing for the first respondent urging this Court to dismiss the appeal, argued that the arguments placed before this Court was

considered by the Trial Court. When the appellant's own sister Kamalammal also moved an application in E.A. No.97 of 2009 to uphold her right, title and interest on the western side to the extent of 86Ca in the Execution Petition mentioned property claiming that she has acquired the title through the Gift Deed dated 02.01.2002 executed by Virudachalam Pillai in her favour, after due enquiry, the Trial Court dismissed the application on the ground that the same donor had cancelled the Gift Deed through another document dated 30.09.2004. When the said Kamalammal is also admittedly the daughter of S.Govindarasu, the second respondent herein, who is the judgment debtor in the Execution Petition, the contention made by the appellant that she has been in possession and enjoyment of the suit property for the last seven years in the capacity of the owner was not accepted. Besides, when the burden of proof is on the appellant to prove that she got enforceable interest in the execution petition mentioned property, without substantiating the same, she cannot come to this Court, therefore, the E.A. No.135 of 2010 filed by the decree holder for removal of obstruction caused by the appellant was rightly allowed and the same cannot be questioned now.

6.Heard the parties on both sides.

7.It is seen from records that when the first respondent filed a suit in O.S. No.39 of 1998 to pass a preliminary decree declaring that the amount was due to the plaintiff on the suit mortgage towards principal interest and costs of the suit till the date of decree, the Trial Court, after framing various issues, came to the conclusion that the appellant's father/defendant, the second respondent herein borrowed a sum of Rs.1,50,000/- and executed mortgage deed Ex.A1 in respect of the suit property on 28.08.1996. Since the entire amount was due towards the debt, finding against the defendant, the second respondent herein that he had received Rs.1,50,000/- on 28.08.1996, for which he executed a mortgage deed for Rs.1,50,000/- due to the plaintiff, first respondent herein, the Trial Court passed a preliminary decree as prayed for. Thereafter, a final decree was also passed on 17.09.2001. After obtaining the final decree, E.P. No.19 of 2007 in E.P. No.57 of 2002 in O.S. No.39 of 1998 was filed by the first respondent on 04.10.2007. Opposing the above prayer, a counter affidavit was filed by the the second respondent, father of the appellant. After considering the rival claims, an order was passed on 15.09.2012 for removal of obstruction caused by the appellant. Questioning the same, the present appeal has been filed.

8.Two vital issues are taken up by both parties. When the appellant's own sister Kamalammal had moved an Application in E.A. No.97 of 2009 to uphold her right, title and interest on the western side to the extent of 86Ca in the suit property claiming that she has acquired the title through the Gift Deed dated 02.01.2002 executed by Virudachalam Pillai in her favour, after due enquiry, the Trial Court dismissed the application on the ground that the same donor had cancelled the Gift Deed through another document dated 30.09.2004. Raising the same plea and claiming that she has cleared the title through the Gift Deed executed by Virudhachalam in her favour, the appellant herein, has not even produced the original Gift Deed and has produced only a xerox copy of the same and therefore, after due enquiry, the Trial Court rightly dismissed the application. Therefore, the appellant cannot say that there has been a Gift Deed executed by Virudhachalam Pillai. The second respondent, Govindarasu, who is the father of the appellant, suffered a decree passed in O.S. No.39 of 1998 and when the preliminary decree and final decree dated 25.11.1998 and 17.09.2001 were passed in O.S. No.39 of 1998, the Trial Court is bound to execute the decree as the same became final. When the application moved by one of the daughters of the judgment debtor was dismissed by the Trial Court, the appellant being another daughter of the judgment debtor cannot resort to Order XXI Rule 97 of C.P.C. The reliance placed before this Court by the learned counsel appearing for the appellant on the judgment of the Apex Court in A.V.Pappayya Sastry and others vs. Government of A.P. and others reported in 2007 (4) SCC 221 has no application in view of the peculiar facts and circumstances of the case.

9.In view of the aforesaid reasons, the decretal order passed by the District Court, Karaikal, allowing the petition filed under Order XXI, Rule 97 of C.P.C. for removal of obstruction caused by the appellant deserves to be confirmed. Accordingly, the appeal fails and the same is dismissed with costs of Rs.10,000/- payable by the appellant to the Tamil Nadu Mediation and Conciliation Centre, High Court, Madras within a period of two weeks from the date of receipt of a copy of this order. No costs. Consequently, connected M.P. is closed.

Sd/-

Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

vga

To

1.The District Court,
Karaikkal.

2.The Assistant Registrar,
Tamil Nadu Mediation and Conciliation Centre,
High Court, Madras-104.

+1cc to MR.K.P.Jotheeswaran, Advocate SR.70089

C.M.A. No.3667 of 2012
and M.P. No.1 of 2012

PPA(CO)
CB(18/02/2020)