



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 17.11.2016

CORAM:

THE HONOURABLE MR. JUSTICE M. SATHYANARAYANAN
and
THE HONOURABLE MRS. JUSTICE J. NISHA BANU

A.S. (MD) No.21 of 2016
and
C.M.P. (MD) No.1504 of 2016

1.S.Krishnamoorthy
2.S.Somu

... Appellants/Plaintiffs

Vs.

1.Pandian
2.S.Vimala
3.S.Kasiraman

... Respondents/Defendants

Prayer: Appeal Suit is filed under Order XLI r/w Section 96 of C.P.C against the judgment and decree passed in O.S.No.40 of 2014 on the file of the II Additional District and Sessions Judge, Thanjavur dated 21.07.2015.

For Appellants : Mr.V.Chandrasekar

For Respondents : Mr.C.Padmaraj
1 & 2 for Mr.K.Vaithilingam

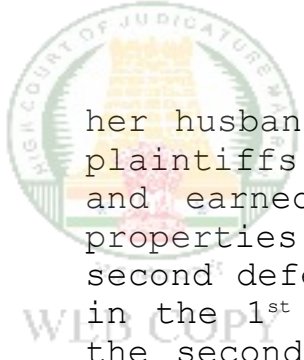
For 3rd Respondent : No appearance

J U D G M E N T

(Judgment of this Court was delivered M.SATHYANARAYANAN, J.)

By consent, the Appeal Suit is taken up for final disposal.

2.The plaintiffs are appellants. They filed a suit in O.S.No.40 of 2014 on the file of the II Additional District and Sessions Judge, Thanjavur, praying for partition and separate possession of their 2/5th share and other consequential reliefs. The appellants/plaintiffs would aver among other things that the suit properties originally belong to their mother, namely, Dhanalakshmi and she executed a registered settlement in favour of



her husband and father of the plaintiffs, namely, Saminathan. The plaintiffs would further aver that their father was a hard worker and earned a lot of money and from his earning he purchased properties in favour of his sons in the following manner. The second defendant was settled with the property in the ground floor in the 1st item and the 3rd defendant was given a vacant site and the second plaintiff was staying in the first floor of the first item. It is further stated by the plaintiffs that after the demise of their mother, their father became senile and started living lonely and they only looked after his health and the first defendant and his wife never cared of him. The father of the plaintiffs was not in a position to climb the stairs to live with the 2nd plaintiff. He developed kidney problem and Hernia operation was done to him. Hence, he executed a will in respect of his properties. The first defendant taking advantage of the senility and his physical ailment managed to get a registered settlement deed dated 06.08.2012 executed in his favour and according to the plaintiffs, it was done when his father was not insane state of mind and was also suffering due to physical ailment and therefore the same was not legal. The plaintiffs would aver that in so far as the second item is concerned it is not the subject matter of the above settlement deed and therefore, the plaintiffs are entitled to 2/5 shares. Therefore, prayed for passing preliminary decree with costs. The defendants entered appearance, but they remained absent. Therefore, they were set exparte. The first plaintiff examined himself as P.W.1 and marked Exs.A1 to A4. The trial Court has formulated the following point for consideration:

"Whether the plaintiffs are entitled for the relief of partition of 2/5th shares as prayed for?"

The learned counsel for the plaintiffs placed reliance on the judgment of the Single Bench of this Court in **Subramanian v. Kosalai Ammal & Others [2014-3-L.W. 397]**, wherein it is held that the documents being void documents, the relief of cancellation need not be asked and contended that though the settlement deed dated 06.08.2012 said to have been executed in favour of 1st defendant, since it came into being when their father was senile, it need not be proved as it is null and void and therefore, prayed for decreeing the suit. The trial Court after taking into consideration evidence of P.W.1 and Exs.A.1 to A4 found that rightly or wrongly the father of the plaintiffs had executed a registered settlement deed dated 06.08.2012 in favour of the first defendant and unless declaring the instrument as null and void the relief prayed for partition cannot be granted and citing the reason dismissed the suit vide judgment dated 21.07.2015 and challenging the legality of the same the present appeal is filed.

<https://hcservices.courtservice.in/hcservices>
 The learned counsel for the appellants/plaintiffs would contend that though the registered settlement deed dated 06.08.2012 came into being, it is an admitted fact that the father



of the plaintiffs and 1st defendant died within a few days from the date of execution of the settlement deed and that apart, he was affected by senility and also affected due to physical ailment. It is further submitted by the learned counsel for the appellants/plaintiffs that the second item of the suit property was not the subject matter of registered settlement deed dated 06.08.2012 and even for the sake of argument without construing that the finding of the trial Court is sustainable, the trial Court ought to have considered the case of the appellants in respect of second item of the suit property and adjudicated the suit on merits. However, dismissed the suit in toto. It is also contended that the first defendant after delivery of the judgment filed a petition to set aside the exparte along with the written statement and the said aspect has not been taken note of by the trial Court, and prays for setting aside the judgment and decree of the trial Court for fresh disposal. It is also pleaded by the appellants/plaintiffs that in the event of the matter being remanded the plaintiffs may also go for amendment of relief to declare the registered settlement executed in favour of the first respondent as null and void and prays for setting aside the impugned judgment and decree and remanding the matter to the trial Court.

4.The learned counsel for the respondents 1 and 2 would submit that it is true that the first respondent has also filed petition to set aside the exparte order along with written statement and since the suit came to be disposed of on merits, the said application could not be prosecuted.

5.Though the third respondent has been served and his name appeared in the cause list, there is no representation on his behalf.

6.This Court paid it's best attention to the rival submissions and perused the materials available on record carefully.

7.The following questions arise for consideration:

(1) In case of void documents, whether declaratory relief is mandatory?

(2) To what other relief the plaintiffs/appellants are entitled?

8.Question No.1 : It is the specific and categorical stand of the appellants/plaintiffs that their father, after the demise of his wife, became senile and he was not keeping good health and the first respondent managed to get the registered settlement deed in his name from the court within a short span of time he died on 31.08.2012. The said stand of the plaintiffs has not been refuted by the respondents in the form of written statement as they remained



exparte.

9. In the judgment relied on by the appellants/plaintiffs before the trial Court in **Subramanian v. Kosalai Ammal & Others [2014-3-L.W. 397]**, a Single Bench while answering to a question "When a document is challenged as a sham and nominal document, whether it is necessary to seek the remedy of setting aside the document?" has placed reliance upon the judgment reported in **(1969) 82 L.W. 622 = (1970) 1 MLJ 207 [Kaka Hajee Md. Ishaque Sahib vs. Kaka Md. Saddiq Sahib and ors.,]** and extracted a portion of the order. In the said portion, it is held that where the documents being void and the transactions which are challenged as sham and nominal and the transactions which are avoid ab initio are not legally binding in character need not be cancelled before any claim is made thereunder. However, in the case on hand, it is a specific case of the appellants/plaintiffs that the first defendant, managed to get the registered settlement deed executed by his father when he is not in fit state of mind and also suffering due to physical ailment and it is also fortified by the fact that within 25 days of executing the said deed he died on 31.08.2012. In the considered opinion of the Court, in the light of the decision above cited, the plaintiffs ought to have been gone for amendment of the plaint, seeking declaratory relief however, they have not done so on account of the legal advice. Therefore, this Court is of the view that a declaratory relief is also necessary to declare the said document as null and void. Therefore, the finding rendered by the trial Court in that regard is sustained.

10. Question No.2: As rightly contended by the learned counsel for the appellants/plaintiffs admittedly the second item of the suit property is not the subject matter of the registered settlement deed executed by the father of the plaintiffs in favour of the first defendant and therefore, the trial Court ought to have adjudicated the said issue and however has failed to do so.

11. It is brought to the knowledge of this Court that the first defendant after dismissal of the suit has filed an application for setting aside the exparte decree with the written statement and it was not entertained as the suit itself was dismissed. In the light of the said fact, the said matter requires remand.

12. In the result, the appeal suit is allowed and the judgment and decree of the II Additional District and Sessions Judge, Thanjavur, dated 21.07.2015 is set aside and the suit is once again remanded to the trial Court for adjudication as to the second item of suit schedule property. If the appellants/plaintiffs are so advised they are at liberty to take suit application for amendment of plaint subject to the law of limitation. It is also open to the defendants to file necessary



application for setting aside the ex parte judgment and decree and as when those applications are filed, be dealt with in accordance with law. However, in the circumstances of the case, no order as to costs.

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To

The II Additional District and Sessions Judge,
Thanjavur.

Copy To: The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

+1 cc to M/s.V.Chandrasekar, Advocate in SR.No.69912

sj

CSL/MR/SAR-II/06.03.2017 :5P/4C

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