

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.03.2020

Delivered on: 15.05.2020

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.156 of 2008

1. Kunhi Parambath Anandan

2. Kunhiparambath Gangadharan

...1 & 2 Appellants/Appellants/Plaintiff

3. Jalaja

4. Jidhin

5. Jijit

...3 to 5 Appellants

(Appellants 3 to 5 brought on record as LR's of the

Deceased 2nd Appellant vide order dated 28.11.2012

made in M.P. No. 1/2012 to 3/12 in S.A.No.156/2008)

Vs

1. Kunhi Parambath Mani

2. Kunhi Parambath Janu

3. Kunhi Parambath Rajan

4. Kunhi Parambath Revathi

...Respondents/Respondents/Defendants

PRAYER: Second Appeal is filed under section 100 of the Civil Procedure Code praying to pass decree and judgment by setting aside the Judgment and decree passed in A.S.No.46 of 2005 dated 18.04.2006 on the file of the II Additional District Judge at Pondicherry in so far as to the extent of confirming and modifying the decree and judgment passed in OS.No.35 of 2004 dated 06.09.2005 on the file of the subordinate Judge, Mahe with regard to first item of 'A' Schedule property and 'B' schedule property and allow the relief sought for in OS.No.35 of 2004 as prayed for by allowing this Second Appeal.

For Appellants : Mr. R. Natarajan

For Respondents : Ms. G. Sumitra for R1, R2 and R4
R3- No appearance

J U D G M E N T

The unsuccessful plaintiffs in the Courts below are the appellants before this Court. The Second Appeal arises from out of a suit for partition. The parties are referred to in the same litigative status as before the Trial Court.

2. The plaintiffs and the defendants are siblings and given below is the geneology.

Kunkar (died)

Keerachi (died 09.12.2002)

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1. Anandan - 1st plaintiff
 2. Gangadharan - 2nd plaintiff
 3. Mani- 1st defendant
 4. Janu - 2nd defendant
 5. Rajan - 3rd defendant
 6. Revathi - 4th defendant

3. Plaintiff's case:

a. The suit scheduled properties originally belonged to the father of the plaintiffs and defendants, one Kunkar. On his death the property devolved on his wife Keerachi and his children, the plaintiffs and defendants. On 19.11.1993 the parties had partitioned the A - Schedule property under deed bearing Doc. No.602 of 1993 on the file of SRO, Mahe. Item 2 of the A - Schedule property was a sum of Rs.20,000/- deposited in the name of the mother Keerachi with the Vijaya Bank, New Mahe.

b. Under the partition deed the properties were divided and each of the sharer was allotted an extent of 3.84 ares each. The house in the A - Schedule property was allotted to the share of Keerachi, where she was living with the plaintiffs and defendants.

c. It is the further case of the plaintiffs that after the partition some of them had constructed separate houses. It was also their case that both the plaintiffs and the defendants had taken care of Keerachi. However, 5 years prior to her demise, Keerachi had gone to the 1st defendant's house and was living with her. On a regular basis the other children used to visit her. Keerachi died on 09.12.2002. At the time of her death Keerachi was aged about 85 years. The plaintiffs would submit

that it was Keerachi's desire that on her death her properties should devolve equally on her children.

d. In keeping with this desire, on her death, the plaintiffs have requested the sisters to partition the property especially the 1st Item. However, there was no positive response from defendants 1, 2 & 4. This constrained the plaintiffs to issue a legal notice dated 09.06.2003. To this defendants 1, 2 & 4 sent a reply dated 23.06.2003 contending that Keerachi had gifted Item 1 the suit property to defendants 1,2 & 4 under a deed dated 12.11.1999. Thereafter, the defendants 1 & 2 had released their rights in the property in favour of the 4th defendant. The plaintiffs would submit that they became aware of the gift deed only when they received the reply notice dated 23.06.2003. They would assail the gift deed on the ground that the same was executed by Keerachi when she was not in a sound and disposing state of mind and when she was physically very frail. The gift deed has been created by fraud and undue influence. The plaintiffs would contend that they are ignoring this deed and seeking for a partition.

4. Written statement of defendants 1 & 2:

They would clearly and categorically state that the gift deed in respect of item 1 of the A - Schedule property was made when Keerachi was in a sound and disposing state of mind and that too on her instructions. It was only the daughters who had taken care of her. These defendants would further contend that the plaintiffs had not even visited the mother. These defendants denied knowledge about B - Schedule property. They had further contended that Keerachi would only visit the house of her daughter and stay there for a day or two. She was quite independent and took care of herself. The mother always wanted to give her share in the property to her daughters. As regards item 2 they would contend that they are entitled to a share.

5. Written Statement of the 3rd defendant:

This defendant would more or less adopt the averments in the plaint and seek a 1/6th share in Items 1 & 2 of A- Schedule and B - Schedule.

6. Written Statement of the 4th defendant:

She would reiterate the statement of her sisters, defendants 1 & 2 with reference to the 1st item and as regard item 2 she would contend that she has no objections to partitioning Item 2. As regards the B - Schedule she would contend that there is no amount lying in the name of Keerachi at the time of her death.

7. Trial Court:

The Subordinate Judge, Mahe on a basis of the pleadings had framed the following issues:

1. Whether Keerachi was not capable of doing her own before 5 years of her death ?

2. Whether the gift deed dated 11.11.1999 registered as document No.622/99 executed by Keerachi under fraud, undue influence and coercion of defendants 1,2 and 4?

3. Whether the plaintiffs and the third defendant are entitled to the relief of partition as prayed for ?

4. To what relief the parties are entitled ?

Ultimately, the Trial Court upheld Ex.B.1 gift deed and Ex.B.2 release deed. The learned Judge had observed that though the plaintiff had pleaded that Keerachi was not in a sound disposing state of mind at the time of execution of Ex.B.1 gift deed and that the same had been obtained by fraud coercion and misrepresentation the said contention had not been proved by them. As regards the B - Schedule property the learned Subordinate Judge had held that the account was a joint account of Keerachi and the 4th defendant and the money having been withdrawn nothing remained to be partition. With these observations the suit was dismissed.

8. Appellate Court:

Challenging the said Judgement and Decree, the plaintiffs had filed A.S.No.46 of 2005 on the file of the II Additional District Judge, Pondicherry. The learned District Judge partly allowed the appeal. The Judgement and Decree of the Subordinate Judge, Mahe in so far it related to Item 1 was confirmed and in respect of Item 2 partition was granted with a 2/6th share being allotted to the plaintiff and a 1/6th share to the 3rd defendant. As regards the B- Schedule property the learned Judge had permitted the plaintiffs to file a fresh suit for recovering the money standing in SB account No.2488, Vijaya Bank, New Mahe Branch on the date of the death of their father Kunker.

Challenging the said Judgement and Decree the plaintiffs have filed the instant Second Appeal.

9. Second Appeal:

This Court by order dated 31.01.2008 had directed notice to the respondents / defendants. The Second Appeal had not been admitted. Mr.R.Natarajan, learned counsel appearing on behalf of the plaintiffs would contend that the mother was not in a sound disposing state of mind and she was also confined to home with the doctor doing house visits. The learned counsel would rely on the evidence of P.W.1 to prove she was house bound and P.W.2 to show that the deceased Keerachi was admitted as an inpatient. He would further draw the attention of the Court to the evidence of P.W.3 to show the discrepancies with regard to the execution of Ex.B1 and how the document appears conspicuous.

He would also state that the gift deed does not contain the signature of late Keerachi and this coupled with the prevaricating evidence of P.W.3 would show that the gift deed is not a true document. He would further contend that the document and its execution being shrouded in suspicious circumstances it ought to have been proved in the manner known to law particularly when the execution is disputed by the plaintiff. He would in support of his submissions rely on the following Judgement:

"[2003 (7) SCC 683] - M.Rangasamy Vs. Rengammal and other."

The above Judgement is relied to buttress the argument that the document having been disputed the defendants ought to have examined the witnesses as contemplated under Section 68 of the Evidence Act. The deed in question in that case also were gift deeds.

"[(2004) 9 SCC 468] - Krishna Mohan Kulalias Nani Charan Kula and another Vs. Pratima Maity and others".

To canvas the argument where the beneficiary under the deed is in a dominant position then the burden of proof shifts upon the person claiming under the deed to prove absence of fraud, coercion or misrepresentation.

"[(2008) 17 SCC 491] - Bachhaj Nahar Vs. Nilima Mandal and another."

This Judgement of the Supreme Court is in support of the argument that there cannot be evidence without pleading.

"[AIR 1975 Mad 88] - N.Ramaswamy Padayachi Vs. C.Ramaswami Padayachi and others."

In support of the argument regarding the necessity for proving the gift deed in the manner known to law by examining the attesting witnesses.

10. Per contra, Ms.G.Sumithra, learned counsel appearing for the defendants 1, 2 & 4 would contend that Ex.B.1 is a registered document. Further it is not a Will which requires proof of attestation. She would invite the attention of this Court to the Judgement reported in "[2017 (3) CTC 79] - Muthusamy Vs. S.Kaliammal and others."

The learned Judge held that where the execution of the document has not been specifically denied there is no necessity to examine the attesting witnesses. The execution of the settlement deed therein was upheld.

She would therefore contend that the gift deed Ex.B.1 is a valid document and the plaintiffs have failed to prove their case.

As regards the B - Schedule property the learned counsel would contend that after the mother it is the 4th defendant's money that was withdrawn by her. The account was a joint account. However, these defendants have not challenged the Judgement and Decree of the learned District Judge with reference to the 'B' Schedule.

11. Discussion:

The plaintiffs have sought for a partition of the properties by ignoring Ex.B.1 gift deed which according to them has not been executed by their mother Keerachi in a sound disposing state of mind.

Though the plaintiffs have contended so, they have not proved the same. Further P.W.1 doctor, examined on their side has clearly opined that their mother, Keerachi was in a sound disposing state of mind. Further the plaintiffs have argued that the defendants have been in a dominant position as the mother was under the care and custody of the 1st defendant for over 5 years. This pleading has also not been proved by them and further P.W.3 has himself admitted that it was only a few months prior to her death that she was with the 1st defendant. The gift deed Ex.B.1 was executed 3 years prior to her death. Therefore this argument also fails.

Both the Courts below have extensively considered the evidence and arrived at the finding. The plaintiffs have not made out any question of law much less a Substantial question of law calling for the interference of this Court to the Judgement

and Decree under appeal. The defendants have not challenged the Judgement with reference to the B - Schedule but the plaintiff have contended that the Appellate Court has committed a grave error in relegating this issue to a separate suit. The plaintiffs have not let in any evidence whatsoever to show the amounts that was lying to the credit of the saving bank account that Kunker had with the Vijaya Bank, New Mahe Branch on the date of his death. In the absence of such proof the plaintiffs are not entitled to any relief as they have not come to Court with a definite case. However since the defendants have not challenged the decree with reference to the B - Schedule property this Court is not inclined to interfere with the same.

12. In the result, the Second Appeal is dismissed the Judgement and Decree of the II Additional District Judge, Pondicherry in A.S.No.46 of 2005 is confirmed. No costs.

-s/d-

Assistant Registrar(CS-II)

True Copy

Sub-Assistant Registrar

mrn

To:

1. The II Additional District Judge
Pondicherry
2. The Subordinate Judge,
Mahe

Copy to

The Section Officer
VR Section
High Court, Madras 104.

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S.A.No.156 of 2008

GP(CO)
SP(21/01/2021)