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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 07.09.2021

Judgment Pronounced on : 22.11.2021

CORAM

THE HON'BLE MRS.JUSTICE S.KANNAMMAL

Second Appeal No.55 of 2019

Muthuraman @ Muthulinga Iyyer ... Appellant / Defendant

-Versus-

Dhanalakshmi @ Jayalakshmi ... Respondent/Plaintiff

This second appeal is filed under Section 100 of CPC against the judgment and decree dated 03.08.2018 made in A.S.No.90 of 2016 by the learned II Additional Subordinate Judge, Villupuram, confirming the judgment and decree dated 07.04.2016 made in O.S.No.224 of 2011 by the learned Principal District Munsif, Tirukoilur.

For Appellant : Mr.V.Raghavachari

For Respondent : Mr.R.Raja Rajan

JUDGMENT

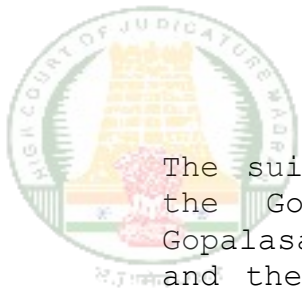
This Second Appeal has been filed by the sole defendant, who had suffered a declaratory decree in favour of the respondent herein in O.S.No.224 of 2011 on the file of the learned Principal District Munsif, Tirukoilur, declaring that the settlement deed alleged to have been executed by the defendant in favour of his son - Subash on 16.12.2009 in respect of the suit 2nd item of the properties and registered as Doc.No.2044/2009 on the file of Sub Registrar, Anniyur, as sham and nominal and ab initio void and restraining the defendant his men or agents from alienating or encumbering the suit properties to any third parties which came to be confirmed in Appeal Suit in A.S.No.90 of 2016 by the Additional Subordinate Judge, Villupuram, Villupuram District by Judgment and decree dated 03.08.2018.

2. The respondent is the plaintiff in the suit. The suit was filed by the respondent for declaration declaring that the



settlement deed dated 16.12.2009 alleged to have been executed by the 2nd defendant in favour of his son and registered as Doc.No.2044/2009 on the file of the Sub Registrar, Anniyur, in respect of the 2nd item of suit properties as sham and nominal and ab initio void and for permanent injunction restraining the defendant his men or agents from alienating or encumbering the schedule mentioned properties to any third parties pleading that the suit properties were originally belonged to one Gopalasamy Iyyer, Son of Sambasiva Iyyer. The defendant is the father of the plaintiff. The father of the defendant while he was alive executed a settlement deed on 04.02.1949 bequeathing the suit properties in favour of the defendant with limited life interest and the remainder interest to the heirs, if any, born to the defendant in the future. The defendant got married Tmt.Kantha @ Lakshmi and through their wedlock, they were blessed with a female child, the plaintiff, on 05.07.1969. The plaintiff is the only heir to the defendant born through the said wedlock and as per the settlement deed, the plaintiff is entitled to receive the suit properties as remainder. But the defendant did not chose to respect the terms of the settlement deed and had started trying to encumber the suit properties for his lavish expenditure. The plaintiff also came to know through some of the local people of the village that some third parties were trying to purchase the suit properties from the defendant. Therefore, the plaintiff had caused a legal notice on 06.04.2011 calling upon the defendant to restrain himself from alienating the suit properties and also making a demand for handing over of vacant possession of the suit properties to the plaintiff. On receiving notice, though the defendant admitted the settlement deed in his reply, created a settlement deed on 05.08.2011 in favour of one Subash. The said settlement deed is only a sham and nominal and would not bind on the plaintiff and her right over the suit properties. The suit properties are in possession of the defendant. The defendant used to cultivate the suit land by raising sugar cane and paddy and derive income of Rs.75,000/-. Since the defendant violated the terms of the settlement deed, he lost the right to remain in possession of the suit properties as life interest holder. The plaintiff being vested remainder is entitled to protect her rights and therefore, the suit.

3. The appellant, who is the sole defendant in the suit, filed written statement in the suit inter alia contending that his paternal grand father - Thambusamy Vathiyar, was heavily indebted and in order to avoid from the pressing debts, he had conveyed the suit properties to his brother's son - Gopalasamy Iyyer through a nominal sale deed dated 02.07.1937. The said sale deed did not convey any title to the said Gopalasamy Iyyer.



The suit properties situated 60 kms away from the place where the Gopalasamy Iyyer was permanently residing. The said Gopalasamy Iyyer never took possession of the suit properties and the sale deed in his name was not acted upon. However, in order to avoid future issue on the suit properties, Thambusamy Vathiyar approached Gopalasamy Iyyer and requested him to execute the settlement deed in the name of the defendant when he was a minor, accordingly, the said Gopalasamy Iyyer on 04.02.1949 executed the settlement deed. Though the suit Item Nos.4 and 5 are not subject matter of the earlier sale deed dated 02.07.1937, the said properties were also included in the settlement. The properties under suit schedule item Nos.4 and 5 actually belongs to Dhanabakiyam, the mother of the defendant.

4. The suit 2nd item of the suit properties in s.NO.16/7 originally measured 3 Acres and 23 cents, in the said field, 1 Acre and 23 cents on its western portion was belonged to Dhanabakiyam who had bequeathed the same to the defendant through an unregistered will dated 11.03.1973 which has been settled by the defendant in favour of his son Subash through the settlement deed which is the subject matter of the suit. The above said settlement deed was accepted upon and the settlee has been in possession of the property. The properties mentioned in the settlement deed are not covered under the settlement deed dated 04.02.1949. The defendant first married Kantha, the wife of the plaintiff. As the said Kantha had eloped with one Veerappan of Perichanur village, the defendant divorced her in the first week of October, 1975 before the villagers as per the custom prevailed in the village and thereafter, he remarried Kaveri on 17.10.1975 and through the said wedlock, they were blessed with two sons, Subash and Dhanasekaran and two daughters, Anandhi and Uma of whom Dhanasekaran died on 17.03.2008 leaving behind his wife, the defendant as his legal heir. The date of birth of the plaintiff mentioned in the plaint as 05.07.1969 is incorrect, and as per the records, she was born on 18.10.1973, As the defendant had settled 1 Acre and 23 cents in favour of Subash with valid title, the suit in respect of the settlement deed is not maintainable. The suit is liable to be dismissed with cost.

5. Based on the above pleadings of either parties, the court below had framed the following issues for trial:-

(1) Whether the plaintiff is entitled to the relief of declaration with regard to the settlement deed dated 16.12.2009 as sham and nominal and void ab initio?



(2) To what other relief the plaintiff is entitled for?

6. During trial, on the side of the plaintiff, the plaintiff examined herself as P.W.1 and proved as many as 11 documents as Ex.A1 to A.11 and on the side of the defendants, the defendant examined himself as D.W.1 besides examining one Ponnusamy Gounder as D.W.2 , A.N.Arumugam as D.W.3 and Pandurangan as D.W.4 and proved as many as 10 documents as Ex.B.1 to B.10.

7. The learned Principal District Munsif after having considered the oral and documentary evidence adduced by either parties had given findings that the defendant himself admitted in evidence that the plaintiff is his daughter and he further admitted in his cross examination about the execution of Ex.A.1 and A3 and also the fact that he had only life interest over the suit properties. Therefore, the learned Judge had come to a conclusion that the defendant did not have right to execute any settlement deed in respect of the suit property and as such settlement deed in question was only a sham and nominal and it is void ab initio. That apart, the learned Judge had also come to a conclusion that the plaintiff is entitled for permanent injunction as prayed for against the defendant from alienating the suit properties. Challenging the same, the defendant preferred an appeal which was dismissed by the first appellate court. Feeling aggrieved by the same, the defendant is before this court with this second appeal.

8. This second appeal was admitted on the following substantial questions of law:-

(1) Whether the courts are right in declaring Ex.B3 as sham and nominal, even in the absence of proper and necessary party, namely , the settlee, being arrayed as party?

(2) Whether the courts below are justified in shifting the burden of proof on the defendant to prove he had acquired the property under Ex.B.3, when it is the obligation of the plaintiff to prove the nature of the property?

(3) Whether the courts below have not rendered a perverse finding especially when Ex.B.1 speaks of 2 Acres and the description in Ex.B3 totally varies from it?



9. Heard the learned counsel appearing for the parties and perused the entire materials available on record.

10. The appellant herein is the defendant and respondent is the plaintiff. Both are father and daughter. It is not in dispute that the Grand-father of the plaintiff, while he was alive, executed a Settlement Deed Exhibit A1 on 04.02.1949 bequeathing the suit properties in favour of the defendant with a limited life interest and the remainder interest to go the heirs if born to the defendant in future. The case of the plaintiff is that she is the daughter of the defendant born to one Tmt.Kanta @ Lakshmi who is the wife of the defendant and that she is the only legal heir to the defendant. As per Ex.A1 Settlement Deed, she is entitled to the suit properties as remainder. Since the defendant was trying to encumber the suit properties without giving regard to the terms of the Settlement Deed and since the 3rd parties were trying to purchase the suit properties from the defendant, the plaintiff has caused a legal notice on 06.04.2011 calling upon the defendant to handover the vacant possession of the suit properties and also not to alienate the same to any 3rd parties. In his reply, the defendant, while admitting the Settlement Deed Ex.A1, had stated that he created a Settlement Deed on 05.08.2011 in favour of his son, one Subash. According to the plaintiff, the said Settlement Deed executed by the defendant is sham and nominal and it would not bind on the plaintiff and her rights over the suit properties. Since the defendant executed a Settlement Deed contrary to the terms of the Settlement Deed Ex.A1 in favour of M.Subash, the plaintiff was constrained to file the suit.

11. The specific case of the defendant is that his paternal Grand-father one Tambusamy Vathiyar who was heavily indebted and in order to avoid the debts, he conveyed the suit properties to his brother's son namely Gopalasamy Iyer who is none other than father of the defendant through a nominal Sale deed dated 02.07.1937. Later, while the defendant was minor his father executed a Settlement Deed on 04.02.1949 in favour of defendant. Though the suit item nos.4 and 5 were not the subject matter of the earlier Sale deed dated 02.07.1937, the said properties were also included in the Settlement Deed Ex.A1. These item Nos. 4 and 5 of the suit properties were actually belonging to Dhanabakiyam the mother of the defendant. The entire suit properties were not covered under the Settlement Deed dated 04.02.1949. The defendant first married the mother of the plaintiff, who eloped with one Veerappan and later he married one Kaveri after giving divorce in the presence of villagers as per the customs prevailed in the village. Through



the said Kaveri, he was blessed with two Sons and two Daughters. It is pertinent to note that the defendant had not disputed the execution of the Settlement Deed dated 04.02.1949 by his father in his favour towards limited life interest and remainder interest in favour of the heirs to be born to the defendant. The defendant also not disputed that the plaintiff is his daughter born through his first wife. His specific case is that his mother Dhanabakiyam executed a Will dated 11.03.1973 in his favour in respect of the property measuring 1 acre 23 cents situated on the western side of Item No.2 of the suit schedule property. By virtue of the said Will, he executed Settlement Deed in favour of his son, namely, Subash on 16.12.2009. But, admittedly the defendant had not taken any steps to prove the Will in the manner known to law. Therefore, the Courts below have rightly held that the Settlement Deed executed by the defendant in favour of his son under Ex.B3 cannot be acted upon since the defendant had not acquired any right to alienate the property mentioned therein. On going through the Settlement Deed Ex.A1, it is clearly revealed that the other portion of the property situated in Survey No.16-7 was also belonging to the defendant family and the disputed portion of the property, i.e. 1 acre 23 cents is also ancestral property over which though the defendant inherited the same, but by virtue of Settlement Deed Ex.A1 whatever the rights he acquired, the same was only limited right of conveyance. After the life time of the defendant, by virtue of Ex.A1, the plaintiff is entitled to inherit the said property. As regards the claim of the defendant that though his Grand-father Gopalasamy Iyyer executed Ex.A1 in respect of the suit properties which were derived by him under Ex.B1 Sale deed dated 22.07.1937 executed by his father one Late Thambusamy Vathiyar and that the said Sale Deed Ex.B1 is sham and nominal and was not acted upon by Gopalsamy Iyyer during his life time since he was living far away from the said properties. This was not established by the defendant since a perusal of the Ex.A1, it is found that the said Gopalasamy Iyyer had specifically recited that he had sold some of the properties which he purchased from Thambusamy Vathiyar under Ex.B1. Therefore, by this, it is clear that the Gopalasamy Iyyer acted upon the Sale deed since he sold away certain items of the properties and therefore, it cannot be said that the Ex.B1 is nominal. Therefore, taking into consideration of the entire evidence both oral and documentary, the Courts below have rightly held that the defendant has not established his case.

12. All along the defendant conducted the case as if the plaintiff had no right over the said property. But the defendant has failed to establish his case that he had absolute right over



the suit properties while the Courts below have categorically held that the defendant had only limited his life interest and the remainder shall go in favour of the plaintiff.

13. In fact, the lower appellate Court has gone to the extent of even holding that all the children who were born to the defendant are entitled to the suit properties since admittedly in Ex.A1 Settlement Deed, the intention of the executant Gopalasamy Iyer was very specific that the suit properties should ultimately go in favour of the children who were born to the defendant, while creating life interest in his favour. Therefore, the lower appellate Court has observed that though the children born through second wife Kaveri and the second marriage was not valid, even being illegitimate children are entitled to the property of their father by virtue of section 16 of Hindu Succession Act. This Court also concurred with the findings of the lower appellate Court that all the children born to the defendant both legitimate and illegitimate children are entitled to the suit properties. Since the defendant has not come forward with counter claim that his children born through his second wife, are also entitled by virtue of Ex.A1 Settlement, the Court below, in the absence of necessary parties, despite having observed that they are entitled to the suit properties, not granted any relief. This Court, while concurring with the findings of the Courts below, is of the view that all the children who were born to the defendant including the plaintiff are entitled to the suit properties.

14. In view of the above discussion, the questions of law are answered accordingly.

15. In the result, the Second Appeal fails and the same is dismissed. The parties shall bear their own costs throughout.

Sd/-

Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

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To

1.The II Additional Subordinate Judge,
Villupuram.



2.The Principal District Munsif,
Tirukoilur.

Copy To

The Section Officer,
VR Section,
High Court, Madras.

+1cc to Mr.V.Raghavachari, Advocate SR.No.59884
+1cc to Mr.R.Rajarajan, Advocate SR.No.60412

Second Appeal No.55 of 2019

PA(CO)
GN(05/01/2022)