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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.10.2021

DELIVERED ON : 20.10.2021

CORAM

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

S.A.No.1191 of 2010

and

M.P. No.1 of 2010

1. Vasanthiri

2. Parvathi

3. Thulasi

...Appellants

Vs.

1. Govindan

2. Baburaj

3. Rukmangathan

4. Pradeep

5. Vasanth

... Respondents

Prayer : Second Appeal filed under Section 100 of CPC, 1908 against the decree and judgment dated 30.06.2010 passed in A.S. No.45 of 2006, on the file of the Subordinate Court, Tiruvallur, reversing the decree and judgment dated 19.08.2005 passed in O.S. No.34 of 1998, on the file of the District Munsif Court, Tiruvallur.

Appellants : Mr. M.R. Khapali
for Mr. C.N. Raman

For Respondents : Mr. T. Girish
for Mr. Srinath Sridevan

JUDGMENT

The appellants are the defendants in O.S.No.34 of 1998 on the file of the District Munsif, Tiruvallur, and respondents in A.S. No.45 of 2006, on the file of the Subordinate Court, Tiruvallur,



2. The respondents in the present appeal/plaintiffs filed a suit for the following reliefs.

- i. for a declaration of their title to the suit property.
- ii. for a permanent injunction restraining the appellants/defendants, their men and agents from interfering with their peaceful possession and enjoyment of the suit property and
- iii. for a Permanent injunction restraining the defendants from alienating the suit property.

3. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their ranking in the present appeal would also be indicated.

4. The case of the plaintiffs is that they are the absolute owners of the suit property through a registered Will dated 30.11.1992 executed by one late Rajagopala Naidu, father of the first plaintiff and grand father of plaintiffs 2 to 5 and that mutation of revenue records was also made subsequent to the death of the said Rajagopala Naidu. It is their further contention that the defendants, on 04.02.1998, attempted to trespass into the suit property which was prevented with the help of some elders in the village.

5. The defendants resisted the suit by contending that the Will dated 30.11.1992 was not true and valid and that late Rajagopala Naidu executed a settlement deed in respect of various properties including 16 cents in Survey No.239B/16 of Soolaimeni Village, Uthukottai Taluk, Tiruvallur District (a portion of the suit property), in favour of the defendants 2 and 3. They, therefore, prayed for the dismissal of the suit.

6. The trial Court after framing appropriate issues and after full contest decreed the suit in part vide its decree and judgment dated 19.08.2005 by holding that,

- i. the Will dated 30.11.1992 (Ex.A8) is true and valid.
- ii. since the settlement deed dated 19.03.1980 (Ex.B1) was earlier in point of time, late Rajagopala Naidu had no right to deal with the property settled in favour of defendants 2 and 3.
- iii. the plaintiffs are entitled only to the remaining extent of land in the suit property which is not covered under Ex.B1 settlement deed.

7. Aggrieved over the same, the plaintiffs filed an



appeal in A.S.No. 45 of 2006 before the Subordinate Court, Tiruvallur. The learned Subordinate Judge reversed the findings of the trial court and decreed the suit in full filed by the plaintiffs vide his decree and judgment dated 30.06.2010 on the following grounds.

- i. The settlement deed (Ex.B1) was not acted upon.
- ii. Ex.B1 was not also proved by the defendants by examining one of the attestors as provided under Section 123 of the Transfer of Property Act and Section 68 of the Indian Evidence Act.
- iii. There is no proof of acceptance of the Settlement deed as there was no mutation of revenue records subsequent to the execution of Ex.B1.

8. Now the present second appeal is filed by the appellants/defendants on the following substantial questions of law.

- i. "Whether the conclusion of the lower appellate court that Ex.B1 settlement deed has not been proved in a manner known to law is legally sustainable in view of the proviso to Section 68 of the Indian Evidence Act?
- ii. Whether the finding of the lower appellate court with respect to Ex.B1 is correct in law in view of the admission of P.W.1 regarding the execution of the Settlement Deed?
- iii. Whether the first appellate court is right in applying the provision under Section 123 of the Transfer of Property Act?"

9. The plaintiffs relying on the Will (Ex.A8) executed by late Rajagopala Naidu in their favour had sought for a declaration of their title to the suit property and also for a consequential relief of permanent injunction against the defendants. It is admitted that late Rajagopala Naidu had three sons by names, Bakthavachala Naidu (husband of the first defendant and father of defendants 2 and 3), Govindan (first plaintiff) and late Kothandan (father of plaintiffs 2 to 5). Bakthavachala Naidu died in the year 1969 leaving behind his wife (first defendant) and his two minor daughters, defendants 2 and 3.

10. Mr. M.R. Khapali, learned counsel appearing for the appellants, contended that the first appellate court's decision is against the well settled principles of law and also perverse for the following reasons.

- (1) The first plaintiff (P.W.1) admitted the execution of



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Ex.B1 settlement deed dated 19.03.1980 by his father late Rajagopala Naidu in favour of the appellants 2 and 3 and also had deposed that this was the reason for the other sons of late Rajagopala Naidu for getting patta transferred in their names under UDR scheme, in respect of other properties.

- (2) The first appellate court even without a pleading by the plaintiffs that Ex.B1 was not acted upon had given a finding to that effect against the settled legal proposition of law as laid down by the Supreme Court in Gulabrao Balwantrao and others vs. Chhabubaibalwanta Raw Shinde and others reported in 2003(1) SCC 212 and in Bachhaj Nahar vs. Nilimamandal and another reported in 2008 (17) SCC 491.
- (3) The Will (Ex.A8) was executed 12 years after the execution of Ex.B1 settlement deed and at the most it could be held that late Rajagopala Naidu was not conscious of the fact that he had already executed Ex.B1 settlement deed in respect of 16 cents in the suit survey number.
- (4) The first appellate court by referring to Sir.H.S. Gour's Hindu law held that the possession of the property should be handed over to show acceptance of a gift and it is against the settled legal proposition of law by the Apex Court (three Member Bench) in the decision in Renikuntala Rajamma (D) by Lrs, V.K.Sarwaranamma reported in 2014(4) CTC 572, wherein it has been held that the requirement of delivery of possession is not a sine qua non for making a valid gift.
- (5) Since this is a case of a gift executed by the grand father in favour of his grand daughters (appellants 2 and 3), who lost their father at a young age, non mutation of revenue records was of no consequence as laid down in the decision in K.A. Shanmugam and another vs. Tamilarasi and others reported in 2011-5-LW 553.
- (6) When the Proviso to Section 68 of the Indian Evidence Act stipulates that it shall not be necessary to call an attesting witness to prove the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908(16/08), unless its execution by the person by whom it purports to have been executed specifically denied. In the instant case the first plaintiff admitted the execution of Ex.B1 but the lower appellate court had erroneously held that Ex.B1 has not been proved by examining the attestors.

11. Per contra, Mr.T.Girish, learned counsel for the respondents contended that



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- (1) The first appellate court was right in holding that Ex.B1 was not acted upon and the patta and kist receipts issued in favour of the plaintiff would clearly prove the same.
- (2) One of the conditions "acceptance" as provided under Section 122 of the Transfer of Property Act was not satisfied.
- (3) There was also no mutation of revenue records after the execution of Ex.B1.

12. At the outset, it may be observed that both the courts below had concurrently held that the Will (Ex.A8) executed by late Rajagopala Naidu is true and valid. However, the learned District Munsif in his judgment has observed that since the settlement deed Ex.B1 was earlier in point of time, late Rajagopala Naidu had no right to deal with the property, which was settled in favour of the appellants 2 and 3 and consequently decreed the suit filed by the respondents only with regard to the remaining extent of suit property (not covered under Ex.B1). However, the first appellate court held that Ex.B1 was not acted upon as there was no valid acceptance of a gift and that mutation of revenue records was also not done by the settlees after the execution of Ex.B1. It was also held by the first appellate court that the defendants did not prove the execution of Ex.B1 as provided under Section 123 of the Transfer of Property Act and Section 68 of the Indian Evidence Act.

13. It is to be pointed out that the first plaintiff admitted in his evidence that his father executed Ex.B1 settlement deed in favour of the appellants 2 and 3. As rightly pointed out by the learned counsel for the appellants, the plaintiffs have not pleaded in their plaint that the settlement deed was not acted upon. Hence, the finding of the first appellate court in this regard even without a pleading in the plaint is erroneous and also against the settled proposition of law that no amount of evidence can be looked into in the absence of a specific pleading. Similarly, when there is no specific denial of the execution of the settlement deed, the defendants need not be called upon to prove the same by examining atleast one of the attestors. At this juncture, it is appropriate to extract the proviso to Section 68 of the Indian Evidence Act.

"Provided that it shall not be necessary to call an attesting witness in proof of the execution of the document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908(16/08), unless its execution by



the person by whom it purports to have been executed specifically denied".

The P.W.1 had clearly deposed that only because of the execution of Ex.B1 by his father in favour of the appellants 2 and 3, other brothers got the patta transferred in their name under UDR scheme. He further admitted that the dispute between the plaintiffs and the defendants is only with regard to the house site measuring 16 cents.

14. The contention of the learned counsel for the respondents is that there was no acceptance of Ex.B1 as provided under Section 122 of the Transfer of Property Act. This contention cannot be accepted for the simple reason that the original settlement deed Ex.B1 was produced by the defendants/appellants before the trial court. Ex.B1 also speaks about handing over of possession of the properties mentioned in Ex.B1 by the settlor to the guardian of the settlees. Even otherwise, handing over possession of the property is not a sine qua non as laid down in the decision in Renikuntla Rajamma (D) by Lrs. vs. K. Sarwanamma reported in 2014 (4) CTC 572, and the relevant portions are extracted hereunder.

..... A conjoint reading of Sections 122 and 123 of the Act makes it abundantly clear that "transfer of possession" of the property covered by the registered instrument of the gift duly signed by the donor and attested as required is not a sine qua non for the making of a valid gift under the provisions of Transfer of Property Act, 1882. Judicial pronouncements as to the true and correct interpretation of Section 123 of the T.P. Act have for a fairly long period held that Section 123 of the Act supersedes the rule of Hindu Law if there was any making delivery of possession an essential condition for the completion of a valid gift. A full bench comprising five Hon'ble Judges of the High Court of Allahabad has in Lallu Singh v. Gur Narain and Ors. AIR 1922 All. 467 referred to several such decisions in which the provisions of Section 123 have been interpreted to be overruling the Hindu Law requirement of delivery of possession as a condition for making of a valid gift. This is evident from the following passage from the above decision where the High Court repelled in no uncertain terms the contention that Section 123 of the T.P. Act merely added one more requirement of law namely attestation and registration



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of a gift deed to what was already enjoined by the Hindu Law and that Section 123 did not mean that where there was a registered instrument duly signed and attested, other requirements of Hindu Law stood dispensed with:

"7. Dr. Katju, on behalf of the appellant, has strongly contended that by Section 123 it was merely intended to add one more requirement of law, namely, that of attestation and registration, to those enjoined by the Hindu Law, and that the Section did not mean that where there was a registered document duly signed and attested, all the other requirements of Hindu Law were dispensed with. Section 123 has, however, been interpreted by all the High Courts continuously for a very long period in the way first indicated, and there is now a uniform consensus of opinion that the effect of Section 123 is to supersede the rule of Hindu Law, if there was any, for making the delivery of possession absolutely essential for the completion of the gift. We may only refer to a few cases for the sake of reference, Dharmodas v. Nistarini Dasi (1887) 14 Cal. 446, Ballbhadra v. Bhowani (1907) 34 Cal. 853, Alabi Koya v. Mussa Koya (1901) 24 Mad. 513, Mudhav Rao Moreshvar v. Kashi Bai (1909) 34 Bom. 287, Manbhari v. Naunidh (1881) 4 All. 40, Balmakund v. Bhagwandas (1894) 16 All. 185, and Phulchand v. Lakkhu (1903) 25 All. 358. Where the terms of a Statute or Ordinance are clear, then even a long and uniform course of judicial interpretation of it may be overruled, if it is contrary to the clear meaning of the enactment but where such is not the case, then it is our duty to accept the interpretation so often and so long put upon the Statute by the Courts, and not to disturb those decisions, vide the remarks of their Lordships decisions, of the Privy Council in the case of Tricomdas Cooverji Bhoja v. Sri Sri Gopinath Thakur AIR 1916 P.C. 182. We are, therefore, clearly of opinion that it must now be accepted that the provisions of Section 123 do away with the necessity for the delivery of possession, even if it was required by the strict Hindu Law."

.....

13. A plain reading of the above made it manifest that



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the "rules of Hindu law" and "Buddhist Law" were to remain unaffected by Chapter VII except to the extent such rules were in conflict with Section 123 of the Transfer of Property Act. This clearly implied that Section 123 had an overriding effect on the rules of Hindu Law pertaining to gift including the rule that required possession of the property gifted to be given to the donee. The decisions of the High Courts referred to in the passage extracted above have consistently taken the view that Section 123 supersedes the rules of Hindu law which may have required delivery of possession as an essential condition for the completion of a gift. The correctness of that statement of law cannot be questioned. The language employed in Section 129 before its amendment was clear enough to give Section 123 an overriding effect vis-a-vis rules of Hindu Law. Section 129 was amended by Act No. 20 of 1929 whereby the words "or, save as provided by Section 123, any rule of Hindu or Buddhist Law" have been deleted. Section 129 of the T.P. Act today reads as under:

"129. Saving of donations mortis causa and Muhammadan Law - Nothing in this Chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law."

.....

15. The matter can be viewed from yet another angle. Section 123 of the T.P. Act is in two parts. The first part deals with gifts of immovable property while the second part deals with gifts of movable property. Insofar as the gifts of immovable property are concerned, Section 123 makes transfer by a registered instrument mandatory. This is evident from the use of word "transfer must be effected" used by Parliament in so far as immovable property is concerned. In contradiction to that requirement the second part of Section 123 dealing with gifts of movable property, simply requires that gift of movable property may be effected either by a registered instrument signed as aforesaid or "by delivery". The difference in the two provisions lies in the fact that in so far as the transfer of movable property by way of gift is concerned the same can be effected by a registered instrument or by delivery. Such transfer in



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the case of immovable property no doubt requires a registered instrument but the provision does not make delivery of possession of the immovable property gifted as an additional requirement for the gift to be valid and effective. If the intention of the legislature was to make delivery of possession of the property gifted also as a condition precedent for a valid gift, the provision could and indeed would have specifically said so. Absence of any such requirement can only lead us to the conclusion that delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property."

As rightly pointed out by the learned counsel for the appellants non mutation of revenue records also is of no consequence as far as the present case is concerned as the settlor, the grand father, has settled some of his properties in favour of his grand daughters who lost their father at a young age. In fact, both the settlees were minors at the time of execution of settlement deed (Ex.B1). Admittedly the property is a vacant site. Therefore, the first appellate court was wrong in concluding that Ex.B1 was not acted upon. Apart from this, it is in evidence that the first respondent was a Village Administrative Officer of the same village and it is the contention of the appellants that patta was transferred in name of the first respondent even during the lifetime of Rajagopala Naidu. The suit was filed by the respondents and no acceptable evidence was adduced by them to show that they were in enjoyment of the entire suit property. The claim of adverse possession made by the respondents cannot be accepted simply for the reason that the title is claimed based on a Will dated 30.11.1992 (Ex.A8) executed by late Rajagopala Naidu.

15. In view of the reasons stated by me, I answer the substantial questions of law 1 and 2 in favour of the appellants. As regards the third substantial question of law is concerned, I hold that the first appellate court has not properly considered Section 123 of the Transfer of property Act and hence the observation of the first appellate court in this regard is perverse.

16. In the result,
- i. the second appeal is allowed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.
 - ii. the decree and judgment dated 30.06.2010 passed



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in A.S. No.45 of 2006, on the file of the Subordinate Court, Tiruvallur, is set aside.
iii.the decree and judgment dated 19.08.2005 passed in O.S. No.34 of 1998, on the file of the District Munsif Court, Tiruvallur, is upheld.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

bga

To

1. The Subordinate Judge,
Tiruvallur.
2. The District Munsif,
Tiruvallur.

+lcc to Mr.Srinath Sridevan, Advocate SR.No.54203
+lcc to Mr.Khapali, Advocate SR.No.53628

S.A.No.1191 of 2010

SS(CO)
GN(25/11/2021)