



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.10.2021

CORAM:

THE HONOURABLE MR. JUSTICE G.R. SWAMINATHAN

S.A.(MD)No.799 of 2013

M.Sam Viswaraja

... Appellant / Respondent/Cross Appellant/
Defendant

-Vs-

M.Sam Livingston

... Respondent / Appellant / Respondent /
Plaintiff

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree passed in A.S.No.80 of 2006, dated 23.08.2013 on the file of the Principal Sub Court, Nagercoil reversing the judgment and decree passed in O.S.No.161 of 2001 dated 03.07.2006 on the file of the Principal District Munsif Court, Nagercoil.

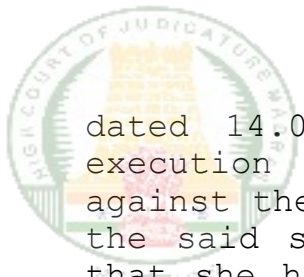
For Appellant : Mr.V.Meenakshi Sundaram
for Mr.D.Nalla Thambi

For Respondent : Mr.A.V.Arun
for Mr.M.T.Arunan

JUDGMENT

The defendant in O.S.No.161 of 2001 on the file of the Principal District Munsif Court, Nagercoil is the appellant in this second appeal.

2. The respondent herein namely Sam Livingston filed the said suit seeking the relief of declaration of his title and possession over the suit property and for consequential permanent injunction restraining the appellant herein from interfering with the same. The case of the plaintiff / respondent herein is that the suit property originally belonged to his mother Asanath Victoria Muthiah. The defendant / appellant is none other than his younger brother. Asanath Victoria Muthiah executed the settlement deed dated 14.07.2000 in his favour. Since the plaintiff was employed abroad, he had to leave India on 04.08.2000. Thereafter, the plaintiff's mother fell seriously ill. She was admitted in Jeyasekharan Hospital on 30.10.2000. She was discharged on 10.11.2000. During this period, the defendant managed to gain access to the mother and by playing fraud, obtained a sale deed dated 07.11.2000 from her as if the suit property was purchased by him for consideration from the mother. Earlier also, the defendant by playing fraud managed to obtain a will deed dated 23.06.2000 from the mother and the same was duly cancelled by the mother, when she executed the settlement deed



dated 14.07.2000. After the defendant came to know about the execution of the settlement deed, he filed O.S.No.422 of 2000 against the plaintiff and their mother for permanent injunction. In the said suit, the mother filed written statement clearly stating that she had cancelled the will deed dated 23.06.2000 and executed the settlement deed dated 14.07.2000. O.S.No.422 of 2000 came to be dismissed on 28.11.2000. Apprehending trespass by the defendant based on the fraudulent sale deed dated 07.11.2000, the plaintiff was constrained to file the said suit. The defendant / appellant herein filed written statement controverting the plaint averments. Based on the rival pleadings, the trial court framed the following issues:-

- "(i) Whether the plaintiff has got possession as per the settlement deed dated 14.07.2000?
- (ii) Whether the settlement deed is valid?
- (iii) Whether the sale deed dated 07.11.2000 in favour of the defendant is valid?
- (iv) Who is in possession of the suit property?
- (v) To what relief the plaintiff is entitled for ?
- (vi) To what alternative relief, the plaintiff is entitled to?"

3. On the side of the plaintiff, his power agent was examined as P.W.1. Two other witnesses were examined on the side of the plaintiff. Ex.A1 to Ex.A23 were marked. The defendant examined himself as D.W.1. Six other witnesses were examined on his side. Ex.B1 to Ex.B27 were marked. Court exhibits 1 to 3 were also marked. After a consideration of the evidence on record, the trial court dismissed the suit by judgment and decree dated 03.07.2006. Aggrieved by the same, the plaintiff filed A.S.No.80 of 2006 before the Principal Sub Court, Nagercoil. The defendant also filed cross appeal. The first appellate court by the impugned judgment and decree dated 23.08.2013 reversed the decision of the trial court and allowed the appeal and decreed the suit, while the cross appeal suffered dismissal. Aggrieved by the same, this second appeal came to be filed. The second appeal was admitted on the following substantial questions of law:-

"1. Whether the first appellate court is correct in accepting Ex.A1(Gift) merely on the basis of the oral evidence of P.W.1 and P.W.2 more particularly P.W.1 (Power of attorney of plaintiff) cannot depose about the fact regarding acceptance of gift within the knowledge of the plaintiff who kept himself away from the witness box and thus the judgment and decree of the first appellate court warrants interference under Section 100 of Civil Procedure Code?

2. When it is proved from oral evidence of P.W.1 and P.W.2 that the plaintiff and his wife went back to abroad on August,



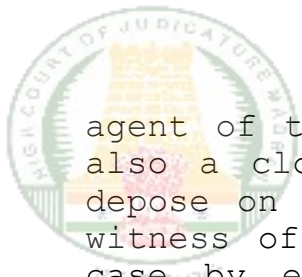
2000 and the gift Ex.A1 is not acted upon and thereafter late.Asanath Victoria (mother of both parties) execute Ex.B10 registered cancellation deed and conveyed the suit property to this appellant under Ex.B11 sale deed, whether the first appellate court is correct in dismissing the cross appeal and thus the judgment and decree of the first appellate court warrants interference under Section 100 of Civil Procedure Code?

3. when the trial court disbelieved the evidence of attesting witness to Ex.A1 namely P.W.1 and P.W.2 regarding the point of registration and drawn adverse inference against the plaintiff and rejected the claim of the plaintiff, whether the first appellate court is correct in upholding Ex.A1 gift by overlooking the contra evidence of P.W.1 and P.W.2 on record and thus the judgment and decree of the first appellate court in A.S.No.80 of 2006 and Cross Appeal warrants interference before this Court under Section 100 of Civil Procedure Code? "

4. The learned counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial questions of law in favour of the appellant and set aside the impugned judgment and decree and sustain Ex.B11 executed in his favour.

5. Per contra, the learned counsel appearing for the respondent submitted that the impugned judgment and decree do not call for any interference. The learned counsel for the respondent submitted that there is no dispute that the suit property originally belonged to their mother Asanath Victoria Muthiah. The execution of the settlement deed dated 14.07.2000 (Ex.A1) is proved by the defendant himself. According to the defendant, by executing Ex.B11 dated 07.11.2000, the settlement deed has been cancelled. The plaintiff therefore need not adduce any further proof to show the execution of Ex.A1 settlement deed in his favour. He pointed out that it is too well settled that a deed of settlement cannot be unilaterally cancelled by the executant. He also would point out that since the plaintiff was employed abroad, he had to leave India on 04.08.2000. Immediately, thereafter, the defendant filed O.S.No.422 of 2000 against their mother and the plaintiff. The written statement filed by the mother was marked as Ex.A6. On a perusal of the contents of Ex.A6, one can come to the conclusion that Asanath Victoria Muthiah had not only affirmed the execution of the settlement deed Ex.A1, but also the fact that she had cancelled the will deed dated 23.06.2000.

6. The learned counsel appearing for the respondent submitted that while it is true that the plaintiff did not enter the witness box, in the facts and circumstance of the case, it would not make any difference. He pointed out that P.W.1 was not only the power

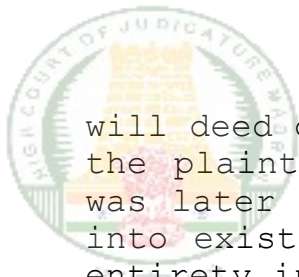


agent of the plaintiff but also one of the attestors of Ex.A1 and also a close relative. Therefore, he is very much competent to depose on behalf of the plaintiff. P.W.2-Thangaiya is a another witness of Ex.A1 and thus, the plaintiff had more than proved his case by examining these two witnesses. He submitted that the question of drawing adverse inference against the plaintiff because he kept away from the witness box will not arise at all in this case. The learned counsel also submitted that immediately after execution of Ex.A1, the plaintiff took steps to have the revenue records changed in his favour. This has been duly proved by marking Ex.A8. Ex.A8 is the communication sent by the jurisdictional Tahsidhar calling the plaintiff for effecting mutation. The mutation of revenue records of-course was made little later. But then, steps were taken even during the life time of their mother.

7. The learned counsel for the respondent submitted that the execution of Ex.B11 is riddled with several suspicious circumstances. He pointed out that originally, the sale deed was not at all produced before the Court. Only the certified copy was marked. The signature of Asanath Victoria Muthiah would reflect the full name. But in Ex.B11, she does not appear to have signed in her usual manner. Admittedly, Ex.B11 came into existence, when the mother was seriously ill and was admitted in the Hospital. She died some 10 days later. The claim that the defendant purchased the property for valuable consideration after paying a certain sum of money to the mother is shockingly improbable.

8. The learned counsel also took me through the court exhibits marked in this regard. He pointed out that in Ex.B11, there are two many interlineations. He also commented on the fact that the registering official who appears to have played a major role in registering Ex.B11, was later thrown out of service for lack of integrity. The learned counsel submitted that the first appellate court re-appreciated the entire evidence on record and gave a finding that execution of Ex.A1 has been duly established, while the defendant failed to prove the due execution of Ex.B11. Such findings of fact properly arrived at by the first appellate court need not be interfered by this Court, while exercising jurisdiction under Section 100 of C.P.C. The learned counsel for the respondent relied on the decisions reported in **(2013) 2 SCC 606 (Gian Chand and brothers Vs. Rattan Lal @ Rattan Singh), 2014 (4) CTC 572 (Renikuntla Rajamma (D) by LRs Vs. K.Sarwanamma) and 2009 (5) CTC 558 (S.Ganesan Vs. Bharathirajan)**. He submitted that no substantial question of law arises for consideration. The learned counsel also filed a detailed notes of argument and took me through its contents.

9. I carefully considered the rival contentions and went through the evidence on record. The appellant and the respondent are brothers. The suit property belonged to their mother Asanath Victoria Muthiah. Asanath Victoria Muthiah had obviously executed a

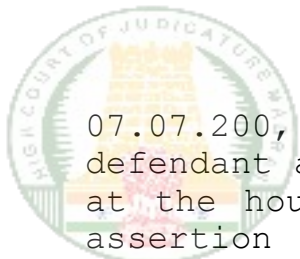


will deed dated 23.06.2000 bequeathing 32 cents of land in favour of the plaintiff and 28 cents in favour of the defendant. This Will was later cancelled and Ex.A1-settlement deed dated 14.07.2000 came into existence. Under Ex.A1, the property had been settled in its entirety in favour of the plaintiff. Thereafter, under Ex.B11-sale deed dated 07.11.2000, the settlement deed was cancelled and the property was sold for valuable consideration in favour of the defendant. The trial court after a consideration of the evidence on record disbelieved the settlement deed as well as the sale deed and held that both the parties are entitled to the suit property by way of inheritance. The plaintiff filed regular appeal before the first appellate court, while the defendant filed cross appeal. The first appellate court dismissed the cross appeal but allowed the plaintiff's appeal by holding that the execution of settlement deed had been duly established.

10. Let me first consider if the defendant had succeeded in establishing Ex.B11. As rightly pointed out by the learned counsel appearing for the respondent, the circumstances that surrounded the execution of Ex.B11 are highly suspicious. Admittedly, Asanath Victoria Muthiah mother of the parties herein was seriously ill and was admitted in the Hospital. It is true that even in such circumstances, Wills are executed. But I find it impossible to believe that a person lying in death bed would execute a sale deed in favour of one of the sons. The original sale deed was not produced before the court below.

11. I carefully went through the contents of the court exhibits. Registration itself appears to have taken place only in the Hospital. There are two many interlineations. It is obvious that the executant was not even in a position to put her signature. It is highly improbable that the executant would have received sale consideration from the defendant and executed Ex.B11. For the reasons set out by the courts below, I hold that the execution of Ex.B11 has not at all been established.

12. The next question that calls for determination is whether execution of Ex.A1 had been established. The suit itself has been filed based on Ex.A1-settlement deed dated 14.07.2000. The defendant had filed a detailed written statement controverting the plaint averments. In paragraph No.8, the defendant had pleaded that the mother had executed a Will dated 23.06.2000 and that the same has been registered. Under the said will, the mother had bequeathed 32 cents to the plaintiff and 28 cents to the defendant. The defendant would of-course make a further claim that on the same day, the mother entered into an agreement with him and handed over physical possession of the suit property based on which he also made improvements. The defendant in paragraph No.5 had pleaded that 07.07.2000, the plaintiff and his wife came to Nagercoil and forcibly took their mother to the plaintiff's house and that after

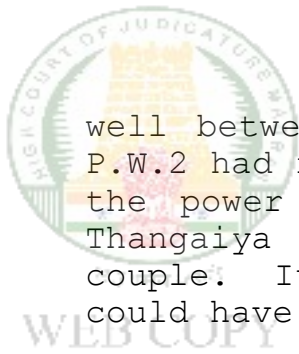


07.07.2000, she was in the custody of the plaintiff and that the defendant and others were not even allowed to see the mother who was at the house of the plaintiff. The categorical assertion of the defendant was that their mother was in the plaintiff's house from 07.07.2000 to 04.08.2000. He further alleged that during this period, the mother was physically weak and taking advantage of the situation, the plaintiff brainwashed the mother and exerted undue influence on her. It has been further alleged that the plaintiff played fraud and that is how, Ex.A1 was obtained.

13. Though the learned counsel for the respondent would contend that the burden to prove the allegations rests only on the defendant by relying on the decision reported in **(2013) 2 SCC 606 (Gian Chand and brothers Vs. Rattan Lal @ Rattan Singh)**, I must hold that the plaintiff ought to have deposed to deny the allegations made against him. The defendant got into the witness box and reiterated all the allegations made against the plaintiff in this regard. But the plaintiff stayed away from the witness box. Of-course, the learned counsel for the respondent would state that the plaintiff was abroad and that therefore he was not in a position to participate in the trial court physically. I am not convinced by this explanation. It was the plaintiff who filed the suit in the year 2001. The suit itself came to be disposed of only on 03.07.2006. Definitely, the plaintiff would have visited India on quite a few occasions during this period. The examination of power agent of the plaintiff as P.W.1 was absolutely insufficient to deny the allegations made by the defendant in his written statement. That the mother Asanath Victoria Muthiah was a pawn in the hands of her sons is obvious and evident. She was admitted in the Hospital on 18.06.2000. A registered Will dated 23.06.2000 came into existence. She was discharged on 03.07.2000. On 14.07.2000, a settlement deed was executed favouring the plaintiff. Thereafter, the mother once again fell ill and the sale deed dated 07.11.2000 was executed in favour of the defendant.

14. From these circumstances, one can safely come to the conclusion that the mother was made to write documents as per the desires of the persons in whose custody she was placed. When she was in the custody of the defendant, she executed the Will and the sale deed. When she was in the custody of the plaintiff, she executed the settlement deed-Ex.A1. That is why, the trial court which also had the benefit of seeing the witnesses in person refused to believe either of the documents. Ex.A1 was propounded only by the plaintiff. Therefore, he had the duty and burden to rebut all the suspicious circumstances surrounding its execution.

15. As rightly pointed out by the learned counsel appearing for the appellant, one of the attesting witness in Ex.A1 is Thangaiya. Thangaiya is none other than the brother-in-law of the executant. It had been established in the cross examination that all was not



well between Asanath Victoria Muthiah and her husband. Thangaiya P.W.2 had filed a case against Asanath Victoria Muthiah by acting as the power agent of her husband. It was further suggested that Thangaiya was the true reason for misunderstanding between the couple. It is therefore inconceivable that Asanath Victoria Muthiah could have summoned such a person be an attesting witness.

16. There are too many discrepancies between the testimonies of P.W.1 and P.W.2. The trial court rightly held that Ex.A1 has not at all been proved. The substantial questions of law are therefore answered in favour of the appellant. The impugned judgment and decree passed by the first appellate court is set aside. But the judgment and decree passed by the trial court cannot be restored as such. Even according to the appellant, the will dated 23.06.2000 was actually executed only by the mother. He does not challenge its contents. Therefore, instead of restoring the decision of the trial court as such, there shall be a preliminary decree for partition in terms of the Will dated 23.06.2000. The plaintiff will take 32 cents of land in the suit property, while the defendant will take 28 cents of land therein.

17. The second appeal is partly allowed. No costs.

18. At this stage, it is brought to the notice of the Court that the appellant had alienated 7 cents along with a house in favour of one Saroja and Rajathi vide sale deed dated 11.02.2002. It is seen that the suit was filed in 2001 itself. In other words, the alienation made by the appellant had taken place after the filing of the suit. It is further stated by the learned counsel for the respondent that the subject matter of alienation is a part of the property that has now been allotted to the respondent. I make it clear that the alienation made by the appellant is subject to the outcome of this appeal. I refrain from saying anything more or even invalidating the sale deed only for the reason that the purchaser/Saroja is not before this Court. It is open to the respondent herein to file a certified copy of this judgment before the appropriate Court and in appropriate proceedings for enforcing the rights conferred on him under this judgment.

Sd/-

Assistant Registrar(CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

rmi / ias



To

- 1.The Principal SubJudge, Nagercoil.
- 2.The Principal District Munsif, Nagercoil.

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+2 CC to M/s.M.T.ARUNAN, Advocate (SR-32105[F] dated 21/10/2021)

Judgment made in
S.A.(MD)No.799 of 2013
08.10.2021

KM(CO)

TR(06.12.2021) 8P 7C