



S.A.No. 658/1997

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.08.2022

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

S.A.No. 690 of 1997

And

C.M.P.No. 7303 of 1997

1. Venkatachala Maistry (died)
2. Lekshmi Ammal
3. Kannan
4. Munian
5. Balakrishnan
6. Raju
7. Minor Ammasi
by N.P. Mother Lakshmi
8. Alamelu
9. Ramayi
10. Lakshmi
11. Perianayagam
12. Ayyamperumal



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13. Chinnadurai (died)

14. Krishnan

15. Chellammal

16. Dhanam

17. Viji

18. Mohan

19. Muthulakshmi

20. Kurlambal

21. Gnanambal

22. Parvathy

23. Latha

24. Mayavel

25. Dhanam

26. Minor Aruna @ Paanchalai

27. Minor Arun

... Plaintiffs/Respondents/Appellants

[Appellants 14 to 24 brought on records LRS of the deceased 1st appellant and appellants 25 to 27 brought LRS of the deceased 13th appellant vide Court order dated 12.12.2019 made in CMP 1401 to 1403 of 2010 and CMP 1404 to 1406/10 in S.A.No. 690 of 1997]



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Vs.

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1. Pandan @ Ramar Maistry
2. Logambal
3. Periasamy Udayar (died)
4. Ramar
5. Thangavel

[RR 4 & 5 brought on record as LRS of the deceased 3rd Respondent vide Court order dated 12.12.2018 made in CMP.No. 1407 to 1409 of 2010 in S.A.No. 690/2010]

... Defendants/Appellants/Respondents

PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree in A.S.No. 160 of 1996 dated 27.01.1997 on the file of the Court of Sub-Ordinate Judge, Kallakurichi, against the Judgment and Decree in O.S.No. 1060 of 1987 dated 30.04.1993 on the file of the learned Principal District Munsif, Kallakurichi.

For Appellants : Mr. S.Krishnasamy

For RR 4 & 5 : Ms. K.Priyadharshini
Amicus Curie



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JUDGMENT

The plaintiffs in O.S.No. 1066 of 1987 on the file of the District Munsif, Kallakurichi are the appellants herein.

2. Pending the Second Appeal, the 1st and 13th appellants died. The legal representatives of the 1st appellant had been brought on record as 14th to 24th appellants and the 25th and 27th appellants had been brought on record as legal representatives of the deceased 13th appellant.

3. It must also be stated that the 1st respondent is actually sailing with the appellants. The 2nd respondent is also reported to have died issueless. The legal representatives of the 3rd respondent have been served but since nobody entered appearance and their names were printed in the cause list, to assist the Court, Ms. K.Priyadharshini, learned counsel had been appointed as amicus to appear on behalf of the said 4th and 5th respondents.

4. By Judgment dated 30.04.1993, the learned District Munsif, Kallakurichi, decreed O.S.No. 1066 of 1987.



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5. The defendants then filed A.S.No. 160 of 1996. The first appeal came up for consideration before the Sub Court at Kallkurichi. By Judgment dated 27.01.1997, the learned Sub Judge allowed the appeal suit and dismissed the original suit. This had necessitated the plaintiffs to file the present Second Appeal.

6. The Second Appeal had been admitted on the following substantial questions of law:-

“1. Whether the lower Appellate Court erred in holding that the settlement deed Ex.A-1 dated 26.12.1960 is not valid, when one of the executants namely the second defendant has admitted the execution of the settlement deed and when especially she has not questioned the same till 12.12.1987?;

2. Whether the Lower Appellate Court erred in law in accepting the evidence of the second defendant quite against and new to her pleadings and especially when she has not pleaded that the settlement deed is vitiated by circumstances like misrepresentation, fraud etc.?



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3. Whether the Lower Appellate Court failed to hold in law that the revocation deed Ex.B-4, dated 12.12.1987 cancelling the settlement deed Ex.A-1 is against the provisions of Section 126 of the Transfer of Property Act?

4. Whether the Lower Appellate Court failed to hold in law that the second defendant is estopped from giving evidence quite against and new to her pleadings in her written statement?"

7. Heard arguments advanced by Mr.S.Krishnasamy, learned counsel for the appellants and Ms. K.Priyadharshini, learned counsel appointed amicus for the 4th and 5th respondents.

8. The suit in O.S.No. 1066 of 1987 had been filed by the plaintiffs seeking partition and separate possession of 14/15th share in the suit properties.

9. The suit properties originally belonged to Ayyamperumal Maistry. He had three sons Muniyan Maistry, Pothan Maistry and Krishna Maistry.



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Muniyan Maistry was married to Logambal. They did not have any children. Pothan Maistry was married to Chellammal as his second wife. Krishna Maistry died leaving behind two sons. Govindan and Chinnapillai. Govindan died a batchelor, while Chinna Pillai died leaving behind his widow and children.

10. The suit properties had fallen to the share of Muniyan Maistry. Muniyan Maistry and his wife Logambal executed a settlement deed of the suit schedule properties on 26.12.1960 in favour of Chellammal, the second wife of Pothan Maistry. The settlement was by a registered document. On the death of Chellammal and Krishna Maistry, the properties devolved on to the plaintiffs and to the first defendant.

11. The plaintiffs filed the suit seeking partition and separate possession of 14/15th undivided share in the suit properties. The 1st defendant was another son of Chellammal. The 2nd defendant was one of the settlors Logambal. She had revoked the settlement deed by a registered document dated 12.11.1987. After such revocation of the settlement deed, she had sold the suit schedule property to the 3rd defendant by sale deed



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dated 27.11.1987. It was under these circumstances, claiming that the 2nd defendant had no right to revoke the settlement deed unilaterally and that the said document is invalid in law and consequently, the sale deed in favour of the 3rd defendant is also not valid in law, the suit had been filed seeking partition and separate possession.

12. By Judgment dated 30.04.1993 the suit was decreed. A specific finding was given that the settlor Logammal had no right to revoke the settlement deed unilaterally. It was also observed that under Section 126 of the Transfer of Property Act, a gift deed cannot be revoked unless the deed provides for such revocation. The learned trial Judge, on the basis of the available evidence, decreed the suit. It must also be mentioned that in the written statement the execution of the settlement deed had been admitted but it had only been claimed that the settlor had every right to revoke the settlement deed.

13. In the written statement, the 2nd defendant had not pleaded that she had been either influenced or coercive to execute the settlement deed. She had also not pleaded misrepresentation. She had also not pleaded that owing to her illiteracy, she had been influenced to execute the settlement deed.



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14. The trial Court in very well considered Judgment, had very categorically held that the settlement deed had been executed out of free will and consent and that therefore, the settlor had no right to revoke the settlement deed. It was also found that under the settlement deed, title had passed on to the settlee and on the death of the settlee, to her legal heirs. It was therefore held that since the property had not been divided into metes and bounds, the suit for partition is maintainable. It was very specifically found that the deed of revocation is a void document and therefore, no right or title had passed to the 3rd defendant.

15. On the basis of the above findings, the trial Court had decreed the suit for partition and separate possession.

16. The defendants then filed an appeal which came up for consideration before the Sub Court at Kallakurichi. The First Appellate Court had taken a very specious plea stating that the settlee had taken advantage of the illiteracy of the settlors and had obtained their signatures in the document and therefore, held that no right flowed under the said document.



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17. It must be mentioned that this observation of taken by the learned First Appellate Judge had not been pleaded in the written statement. The First Appellate Judge took note of the evidence in this regard but again it must be stated that no amount of evidence in the absence pleadings can be examined by the Court particularly on facts and more particularly on facts to the exclusive knowledge of the person who so adduces evidence. If it is the case of the settlor that she had been influenced to execute the settlement deed then that fact should have been first pleaded in the written statement and thereafter, she could have built up that particular statement by adducing necessary oral evidence. Unfortunately in the written statement, she had not taken any such stand. Taking up such a stand during the course of evidence should not have been permitted and even if evidence had been adduced and recorded, should not have been considered while analysing the evidence. The learned First Appellate Judge had therefore travelled for beyond the scope of appreciation of evidence and had taken a plea on behalf of the settlor when she herself had not taken any such stand in the written statement. The First Appellate Judge, had on the basis of the above finding allowed the Appeal Suit. The Original Suit was therefore dismissed.



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18. This had necessitated the plaintiffs to file the present Second Appeal.

19. The substantial questions of law in the Second Appeal surround execution of the settlement deed and the revocation of the same by the Settlor without notice to the Settles and the unilateral revocation by the Settlor after possession has been handed over and after about 27 years. The first, second and fourth substantial questions of law revolves around acceptance of evidence without the same being challenged in the written statement and the third substantial questions of law revolve around cancellation of the settlement deed in violation of Section 126 of the Transfer of Property Act.

20. With respect to the first, second and fourth substantial question of law, in the written statement of the second defendant/ Settlor, she had stated that she and her husband Muniyan Maistry had executed the settlement deed on 20.12.1960. She claimed that it was not a settlement deed and that the said document was not valid in the eyes of law. She also stated that Chellammal had not taken possession of the property. She



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stated that Chellammal did not get any right over the property. She stated that the settlement deed was cancelled. She stated that she had every right to cancel the settlement deed.

21. In this connection, it would be worthwhile to examine Section 126 of the Transfer of Property Act. It is as follows:-

“126. When gift may be suspended or revoked.—

The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be. A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded. Save as aforesaid, a gift cannot be revoked. Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.



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Illustrations

(a) A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(b) A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds goods as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A. "

22. It is very clear that a gift deed or a settlement deed cannot be cancelled or revoked unless and until, there is a specific clause in the settlement deed permitting such revocation.

23. Ex.B-2 dated 12.11.1987 is the settlement deed. The nomenclature of the document is 'settlement deed'. It had been stated that the properties were given as settlement. The document had also been registered in manner known to law.



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24. In the revocation deed, it had been stated that the settlee had not taken care of the settlor and that possession had not been handed over.

25. One of the basic ingredients of a settlement deed or a gift deed is that possession is granted on the date of the document. By the execution of the document, there is not only transfer of title, but also transfer of possession. If at all the said document is to be cancelled or revoked, then a suit will have to be filed for cancellation.

26. In a Division Bench Judge of the Madras High Court reported in **2009 (4) CTC 618 [E.R.Kalaivan Vs. The Inspector General of Registration and another in W.A.No. 507 of 2009]**, it had been very clearly stated that a settlement deed cannot be unilaterally cancelled and that a suit alone will have to be filed for cancellation of the settlement deed. The Judgment is binding on this Court. The said cancellation is also violative of Section 126 of the Transfer of Property Act.

27. Reference can also be made to the observation in the Judgment reported in **(2022) 2 CTC 770 [Ponnusamy Vs. Govindan and Another]**



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wherein the learned Single Judge had relied on an earlier Judgment reported in ***AIR 1925 PC 204 [Mst. Farid-Un-Nisa Vs. Mukhtar Ahmad]*** and stated as follows:-

“ The mere declaration by the settlor, subsequently made, that she had not understood what she was doing, obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them. ”

28. In the instant case, though the settlor had stated in evidence that she did not know the nature of the document she was executing, such evidence



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was not pleaded in the written statement and therefore, the principles of *non-est factum* would not be applicable to the facts of this case.

29. The substantial questions of law are answered accordingly.

30. In view of these reasons without entering into any further discussion, I hold that the Judgment and Decree of the First Appellate Court defies logic and is against settled principles of law. The said Judgment is set aside and the Judgment and Decree of the trial Court is restored and upheld.

31. The Second Appeal is allowed with costs.

32. The Trial Court/ District Munsif Court on receipt of the copy of the Judgment is directed to proceed further with passing final decree under Order 20 Rule 18 CPC even without waiting for in accordance with the directions given by the Hon'ble Supreme Court in **2022 SCC OnLine 737** [*Kattukandi Edathil Krishnan Vs. Kattukandi Edathil Valsan*].



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33. In the result,

- 1) Second Appeal is allowed with costs.
- 2) The Judgment and Decree in A.S.No. 160 of 1996 dated 27.01.1997 on the file of Sub Court, Kallakurichi, is set aside;
- 3) The Judgment and Decree in O.S.No. 1060 of 1987 dated 30.04.1993 on the file of Principal District Munsif, Kallakurichi, is restored and upheld;
- 4) Consequently, connected Civil Miscellaneous Petition is closed.

34. This Court places its deep appreciation for the efforts taken by the learned Amicus Ms. K.Priyadharshini.

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Index :Yes/No

Internet:Yes/No

vsg

To

1. Sub-Court, Kallakurichi.

2. Principal District Munsif, Kallakurichi.



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