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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.02.2022
PRONOUNCED ON : 08.02.2022

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A. No.1391 of 2011
and M.P. No.1 of 2011

1.Bathroom
2.Syed Bismillah
3.Faridha
4.Syed Mohideen
5.Syed Ahmed ...Appellants/Defendants

versus

Syed Ghouse (Died)

Musthiri Begam ...Respondent/Plaintiff

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 27.06.2011 made in A.S.No.14 of 2007 on the file of the learned Subordinate Judge, Gingee, reversing the judgment and decree dated 24.02.2004 made in O.S.No.244 of 1996 on the file of the learned Additional District Munsif, Gingee.

For Appellants : Mr.P.Dinesh Kumar
For Respondent : Mr.Malaisaravanan
for Mr.V.R.Appaswamee

J U D G M E N T

This Second Appeal is focused as against the judgment and decree dated 27.06.2011 passed in A.S.No.14 of 2007 by the learned Subordinate Judge, Gingee, reversing the judgment and decree dated 24.02.2004 passed in O.S.No.244 of 1996 by the learned Additional District Munsif, Gingee.

2. The appellants herein are the defendants and the respondent is the plaintiff in O.S.No.244 of 1996. The suit is for partition and separate possession.

3. For the sake of convenience, hereinafter the parties are referred to, as per their litigative status before the trial Court.

4. The laconic averments made in the plaint, are as follows:



[i] The plaintiff, defendants 5, 6 and one Syed Beeran are brothers. Their mother Fathima Bee has died on 22.10.1992. Their father predeceased her. The brother of the plaintiff, defendants 5, 6, Syed Beeran has died before 1½ months. The first defendant is the wife of the said Syed Beeran and defendants 2 and 3 are sons and 4th defendant is his daughter. Vide Sale Deed dated 05.06.1939, the plaintiff has purchased item no.1 of the schedule mentioned suit property. At that time, since he was in the age of 9 years, the father of the plaintiff did the purchase and registered the same in plaintiff's name.

[ii] In the year 1957, being the eldest member of the family, the plaintiff settled the item no.1 of the suit schedule suit property in favour of his mother. The Sale Deed dated 11.01.1957 was executed by the plaintiff, without any consideration. After executing the Sale Deed, he left the family for business purpose. Item nos.3 to 7 of the schedule mentioned suit property belongs to one Gudu Sahib, the maternal grandfather of the plaintiff and these items were later given to the plaintiff's mother, through a Settlement Deed.

[iii] In respect of item no.8, patta has been issued in favour of the plaintiff's mother. There is a well in item no.1, for which, the plaintiff's mother Fathima Bee obtained service connection in S.C.No.110. Afterwards, due to the water scarcity, the members of the family decided to put up another well in item no.2. In this regard, vide Sale Deed dated 16.03.1992, Syed Beeran sold item no.2 of the schedule mentioned suit property in favour of plaintiff's mother. Taking advantage of the plaintiff being away from the suit properties, the brother of the plaintiff has obtained a Settlement Deed on 20.10.1992 from Fathima Bee.

[iv] After executing the Settlement Deed, within 2 days Fathima Bee has died on 22.10.1992. The said Fathima Bee had no intention to settle the schedule mentioned suit property in favour of the defendants. Hence, the plaintiff issued a notice to the defendants, for which, the defendants 5 and 6 given reply on 13.01.1993. Even after receipt of the notice, the defendants have not come forward to partition the property. Hence, the suit.

5. The case of the fifth defendant, as averred in the written statement and adopted by defendants 1 to 4 and 6, is as follows:

[i] Item no.1 of the schedule mentioned suit property has been purchased by Fathima Bee by utilising her family income. After made purchase, on 20.10.1992, she executed a registered Settlement Deed in favour of her two sons, namely, defendants 5, 6 and one Syed Beeran. After the death of Syed Beeran, the property would go to his sons,



namely, defendants 1 to 4 and thereby, item no.1 of the schedule mentioned suit property, is in the possession and enjoyment of the defendants. Item no.2 of the schedule mentioned suit property belongs to the said Fathima Bee. There is no well or electric service connection in item no.2 of the schedule mentioned suit property. There is a well in item no.1 and for that only, obtained the electric service connection.

[ii] The defendants are not having any objection for partitioning item nos.3 to 8. Item nos.3 to 8 of the schedule mentioned suit property, is in the common enjoyment of the plaintiff and defendants. As regards item no. 1 of the schedule mentioned suit property, defendants herein are enjoying the property for more than 12 years exempting the plaintiff. Hence, the suit filed by the plaintiff is liable to be dismissed.

6. From the above averments, the learned Additional District Munsif, Gingee, framed necessary issues and tried the suit. On the side of the plaintiff, P.W.1 and P.W.2 were examined and marked 9 exhibits as Ex.A.1 to Ex.A.9. Similarly, on the side of the defendants, D.W.1 to D.W.3 were examined and marked 23 exhibits as Ex.B.1 to Ex.B.23.

7. Having considered the materials placed before her, the learned Additional District Munsif, Gingee, by judgment and decree dated 24.02.2004, allowed the suit, as regards item nos.2 to 8 of the schedule mentioned suit property and dismissed the suit in respect of item no.1. In the appeal preferred by the plaintiff in A.S.No.14 of 2007, the learned Subordinate Judge, Gingee, allowed the appeal and ultimately, granted decree in favour of the plaintiff, as prayed for.

8. Feeling aggrieved over the findings arrived at by the lower appellate Court, the appellants / defendants, are before this Court with the present Second Appeal. The Second Appeal was admitted on file, after formulating the following substantial questions of law;

"1. When Sec 68 of the Evidence Act requires examination of attesting witness for proving the will alone, still is the learned Sub-Judge right in holding that Ex.B.2 is not proved as attesting witness was not examined ?

2. Is the learned Sub-Judge right in holding that Ex.B.2 is surrounded by suspicious circumstances, as the registration of Ex.B.2 was after the death of the settler, whereas, Sec 23 of Registration Act provides for registration of documents within 4 months from the date of execution of the same ?



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3. Is the learned Sub-Judge right in placing the burden of proving the self acquisition of Fathima Bee, when it is settled in law, that the person who pleads, joint family property has to prove ?”

9. Heard Mr.Malaisaravanan, learned counsel for Mr.V.R.Appaswamee appearing for the appellants and Mr.P.Dinesh Kumar, learned counsel appearing for the respondent and also perused the materials available on record.

10. Admittedly, the plaintiff, husband of the first defendant, father of the defendants 2 to 4 and defendants 5 and 6 are brothers. In respect of the relationship having by the plaintiff with the defendants, there is no dispute on either side. The present suit has been filed for partition of the schedule mentioned property. In the schedule mentioned suit property, the description of property was mentioned that item nos.1 to 8 are the joint family property of the plaintiff and the defendants.

11. Here, it is a case, the plaintiff prayed this Court to partition the schedule mentioned suit property in respect of item nos.1 to 8. After elaborate trial, the trial Court passed a preliminary decree in favour of the plaintiff with regard to item nos.2 to 8 alone. The learned trial Judge had dismissed the suit in respect of item no.1 of the suit property. Against the said findings, the defendants in the suit has not preferred any appeal. Hence, the decree passed by the trial Court in respect of schedule mentioned suit property in item nos.2 to 8 becomes final.

12. In the said circumstances, the plaintiff alone preferred an appeal in A.S.No.14 of 2007 wherein the First Appellate Court had set aside the findings arrived at by the trial Court and passed a decree for partition in respect of schedule of property in item no.1 also. Only in the said circumstances, challenging the same, the defendants are before this Court with this present Second Appeal.

13. Before the trial Court, it is the case of the plaintiff that, initially item no.1 of the schedule mentioned suit property has been purchased by his father in the name of the plaintiff. Afterwards, in the year 1957, due to the reason that the plaintiff's brothers are not having any property, the mother of the plaintiff worried about the same. Hence, the plaintiff being the eldest son of the family, considering the family situation agreed to execute a Sale Deed in respect of item no.1 of the schedule mentioned suit property in the name of his mother. In otherwise, the Sale Deed dated 11.01.1957 executed by the plaintiff in the name of his mother, is sham and nominal. Therefore, it cannot be said that through the said Sale Deed, the right vested with the plaintiff in item no.1 of the schedule mentioned suit property was transferred



to his mother. Therefore, in the said item also, he is entitled to the relief of partition.

14. On the other hand, it is the case of the defendants that after executing the Sale Deed dated 11.01.1957, item no.1 of the schedule mentioned suit property becomes the absolute property of the plaintiff's mother. On 22.10.1992, before her death, the said Fathima Bee, who was the mother of the plaintiff, in respect of item no.1 of the property, executed Gift Settlement Deed in the name of plaintiff's brothers. Accordingly, the plaintiff, is not having any title or interest in item no.1 of the property.

15. At this juncture, it is the submission made by the learned counsel for the appellants that the lower appellate Court, without considering the position of law, set aside the Sale deed and allowed the partition in respect of item no.1 of the property, which is erroneous in law.

16. Now, on considering the said submissions with the relevant records, in the judgment rendered by the lower appellate Court, it was observed that, in order to prove the Settlement Deed, none of the attestors, who are all signed in the said document, have been examined before the trial Court and therefore, the Gift Settlement Deed alleged to be executed by the mother of the plaintiff, is not proved. Further, after executing the Settlement Deed vide Ex.B.2, the executor has died on 22.10.1992, within 2 days from the date of execution. Therefore, the same also create a suspicious circumstances over the execution of the Settlement Deed and therefore, it cannot be said that the Settlement Deed dated 20.10.1992, is proved as per law required. Only after observing as above, the First Appellate Court, set aside the findings of the trial Court and allowed partition in favour of the plaintiff with regard to item no.1 of the schedule mentioned suit property.

17. In the said circumstances, it is not in dispute that the document now under dispute, is Settlement Deed. In this regard, there is no denial on the side of the plaintiff that the character of the document is a settlement and not otherwise. Therefore, it is necessary to decide whether examining the attesor, is necessary for proving the settlement. The answer is available under Section 68 of the Indian Evidence Act, 1872 wherein the proviso clause reads as follows;

"Provided that it shall not be necessary to call an attesting witness in proof of 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 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."



18. Accordingly, in view of the said proviso clause, it shall not be necessary to call an attesting witness for proving the Settlement Deed. In fact, here, it is a case, the execution of the Settlement Deed, is not disputed on the side of the plaintiff. Therefore, obviously, expecting the attester, as a witness to prove the settlement Deed, is unnecessary.

19. In a similar situation in ROSAMMAL ISSETHEENAMMAL FERNANDEZ (DEAD) BY LRS. AND OTHERS vs. JOOSA MARIYAN FERNANDEZ AND OTHERS reported in (2000) 7 SCC 189 wherein our Hon'ble Apex Court has held as follows;

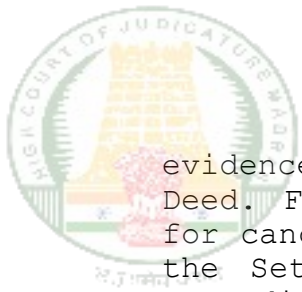
"11. Under the proviso to Section 68 the obligation to produce at least one attesting witness stands withdrawn if the execution of any such document, not being a Will which is registered is not specifically denied. Therefore, everything hinges on the recording of this fact of such denial. If there is no specific denial, the proviso comes into play but if there is denial, the proviso will not apply."

20. Therefore, here, it is a case, being the reason that the execution of the Settlement Deed, is not denied by the plaintiff, it is not necessary for the defendants to prove the execution of the Settlement Deed.

21. As already stated, the another submission made by the learned counsel for the appellants is that, within 2 days from the date of execution, the executor has passed away, only thereafter, the Settlement Deed dated 20.10.1992 was registered in the Sub-Registrar Office and therefore, the said situation creates a suspicious circumstances over the execution of the Settlement Deed.

22. In this regard, it is the submission made by the learned counsel for the respondent that before her death, the said Fathima Bee, after executing the valid Settlement Deed presented the same for registration and thereafter, due to the non-payment of deficit stamp duty under Section 47 of the Indian Registration Act, the document, which was presented for registration, kept pending in the Sub-Registrar Office and only after receipt of deficit stamp paper, the document was registered and therefore, it cannot be said that the execution of the document itself, is doubtful.

23. As regards the said submission, there was no denial on the side of the respondent / plaintiff that, the settler has not presented the document before the Sub-Registrar. On the other hand, while at the time of giving evidence, as D.W.1, the fifth defendant gave evidence as after the payment of Rs.700/- towards the stamp paper, the document was registered. Meanwhile, the plaintiff, as P.W.1 gave



evidence as he does not know the execution of the Settlement Deed. Further, he has stated that he has not filed any suit for cancelling the Settlement Deed and also after execution of the Settlement Deed, the defendants are enjoying the same, according to their shares allotted in the settlement Deed. Therefore, in the absence of any specific prayer for cancelling the Settlement Deed, the First Appellate Court, set aside the Settlement Deed dated 20.10.1992, which is erroneous one.

24. Accordingly, in the light of the above discussions stated supra, I am of the considered opinion that the lower appellate Court came to the wrong conclusion that the Settlement Deed [Ex.B.2] executed by the Fathima Bee, is not proved. Further, the findings arrived at by the lower appellate Court that there was a suspicious circumstances as to the registration of Ex.B.2 also, erroneous one. Accordingly, the substantial questions of law, are all answered as above.

25. In fine, the Second Appeal is allowed. The judgment rendered by the lower appellate Court is set aside and the judgment passed by the trial Court, is restored. Consequently, connected Miscellaneous Petition is closed. However, there is no order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

sri

To

1.The Subordinate Judge, Gingee.

2.The Additional District Munsif, Gingee.

Copy to:

The Section Officer,
V.R.Section, High Court,
Madras-104.

+1cc to Mr.D.Ravichander, Advocate SR. No.7885

+1cc to Mr.V.R.Appaswamee, Advocate SR. No.8002

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