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IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 15.02.2022
PRONOUNCING ORDERS ON : 17.02.2022

Coram:

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

Second Appeal No.130 of 2013
and
MP.Nos.1 & 2 of 2013

K.Shanmugam (Died)
1.S.Natarajan
2.S.Gnanavel

..Appellant/Appellants/
Defendants 1, 7 & 8/

(Cause title accepted vide
order of Court dt.10.01.2013 made in
MP.1/2011 in SASR.7404/2011)

..Vs..

1.Yasodha
2.lakshmi

..Respondents 1 & 2/Respondents 1 & 2/Plaintiffs

3.S.Murugan

..3rd Respondent/3rd Respondent/3rd Defendant

4.Malliga
5.Kavitha
6.Kumudha

...4 to 6 Respondents/4 to 6
Respondents/Defendants 9 to 11

Prayer: Second Appeal filed Under Section 100 of the Code of Civil Procedure against the Judgment and Decree passed in A.S.No.18 of 2008 on the file of Principal District Court, Chengalpattu dated 27.07.2010 confirming the judgment and decree passed in O.S.No.273 of 2002 on the file of the Principal Subordinate Court, Chengalpattu, dated 24.10.2007.

For Appellant : Mr.R.Bala Ramesh
Mr.P.Rathinavel

For Respondents : Mr.V.Seshachari
for R 1 to R 6



JUDGMENT

The defendants 1, 7 and 8 are the appellants in this Second Appeal.

2. The 1st and 2nd respondents/plaintiff filed a suit seeking for the relief of recovery of possession with respect to the 'A' schedule property from the 1st defendant and for the relief of partition with respect to 'B' schedule property and for allotment of 1/4th share to each of the plaintiff. The case of the plaintiff is that one K. Shanmugam (1st defendant) was the absolute owner of the suit properties. Rajammal is his first wife and Kripasankari is the second wife (4th defendant). Three sons were born out of the first wife and they are, the deceased plaintiff Jayaraman, the 2nd defendant and the 3rd defendant respectively. The 1st defendant had four children through his second wife and they are, defendants 5 to 8. Jayaraman died and his wife and daughter have been substituted in his place as the plaintiff. The children of the 2nd defendant who also died during the pendency of the proceedings have been impleaded as D9 to D11.

3. It is stated in the plaint that the 1st defendant executed a registered Settlement Deed dated 19.9.1966, marked as Ex.B-1 in favour of the mother of the plaintiff and in favour of the original plaintiff Jayaraman and the 2nd defendant. As per the Settlement Deed, the mother was given the right to enjoy the 'A' schedule property without any power of alienation and after her lifetime, it will vest absolutely in favour of the original plaintiff Jayaraman and the 2nd defendant.

4. The further case of the plaintiff is that his mother died in the year 1975 and the 'A' schedule property was in possession and enjoyment of the plaintiff and the 2nd defendant and it was in the joint possession of the 3rd defendant.

5. While so, the first defendant executed a revocation deed dated 19.09.1997, marked as Ex.B-2 and cancelled the Settlement Deed dated 19.09.1966. Thereafter, the 1st defendant was continuing to occupy the 'A' schedule property and was refusing to surrender vacant possession. Hence, the plaintiff sought for the relief of recovery of possession with respect to the 'A' schedule property.

6. The plaintiff had also sought for the relief of partition with respect to the 'B' schedule property and there is no requirement to touch upon the facts pertaining to this



property since the present Second Appeal is confined only with the dispute with regard to the 'A' schedule property.

7. The 1st defendant filed a written statement. He accepts the execution of the registered Settlement Deed in favour of his first wife Rajammal. However, the plea taken in the written statement is to the effect that the Settlement Deed was never acted upon and it was a nominal document. The 1st defendant also took the plea that the possession of the property was neither handed over to Rajammal nor to the 2nd and 3rd defendants and it is the 1st defendant who was cultivating the property. Therefore, the 1st defendant had sought for the dismissal of the suit. The other defendants have also filed written statements. However, those written statements pertain to the 'B' schedule properties and hence, the averments made in those written statements may not be relevant for the purpose of this Second Appeal.

8. The Trial Court after considering the facts and circumstances of the case and on appreciation of the oral and documentary evidence, found that the plaintiff is entitled for the relief of possession with respect to the 'A' schedule property and insofar as the relief sought for in the 'B' schedule property, the suit was dismissed. Aggrieved over the Judgment and Decree of the Trial Court, the 1st defendant filed an Appeal and the Appeal was dismissed by a Judgment and Decree dated 27.07.2010 and thereby, the Judgment and Decree of the Trial Court was confirmed.

9. The 1st defendant died on 23.07.2010 and hence the defendants 7 and 8 who were born through the second wife substituted themselves in the place of the deceased 1st defendant. It was also permitted by this court, by an order dated 10.01.2013.

10. This Court framed the following substantial questions of law:

a) Whether both the Courts below erroneously misconstrued Ex.A-1 to be a Settlement Deed and whereas the contents of the document goes to show that it is only a Will ?

b) If Ex.A-1 is construed to be a Will, whether the propounder of the Will will not have the right to cancel the same through the subsequent document dated 19.09.1997 marked as Ex.A-2 ?

c) Whether the plaintiff is entitled for the relief of delivery of possession without seeking



for the relief of declaration?

11. The learned counsel for the appellants submitted that the document dated 19.09.1966 which was marked as Ex.B-1(Ex.A-1) cannot be construed as a settlement in favour of the mother of the plaintiff even though it has been given the nomenclature of a Settlement Deed. According to the learned counsel for the appellants, the contents of the document shows that it can only be construed as a Will. The learned counsel therefore submitted that the 1st defendant can revoke the will at any point of time during his lifetime. Hence the revocation deed marked as Ex.B-2 has the effect of cancelling Ex.B1 and hence no right flows in favour of the plaintiff who are claiming their right under Ex.B-1. The learned counsel in order to substantiate his submissions and to bring about the difference between a Will and a Settlement Deed relied upon the Judgment in Revathi & others v. Nanammal & others reported in 2014-5-L.W.260.

12.The learned counsel for the appellants further submitted that the revocation deed is a voidable document and it has not been challenged by the plaintiff and in view of the same, it is binding on the plaintiff. The learned counsel also questioned the validity of the findings of the Courts below to the effect that the revocation deed is void ab initio. To substantiate his submission, the learned counsel relied upon the Judgment of the Hon'ble Supreme Court in Dhurandhar Prasad Singh v. Jai Prakash University and Others reported in (2001) 6 SCC 534.

13.The learned counsel for the appellants further submitted that the plaintiff is not entitled to seek for the relief of possession without claiming for declaration of title and hence, the relief sought for by the plaintiff with respect to the 'A' schedule property is unsustainable. To substantiate this submission, the learned counsel relied upon the Judgement of this Court in M.Rathinaswamy v. G. Vaithiyanathan reported in CDJ 2019 MHC 010.

14.Per contra, the learned counsel for the 1st and 2nd respondent/plaintiff submitted that the appellants have taken the plea that Ex.B-1 was a Will and not a Settlement Deed, for the first time in this Second Appeal. The learned counsel submitted that this argument goes contrary to the pleadings in the written statement filed by D-1 where the 1st defendant only took a plea that the Settlement Deed was not acted upon. In any case, the learned counsel submitted that a reading of Ex.B-1 will show that it is a Settlement Deed and the 1st defendant had entirely divested his interest in the 'A' schedule property.



15. The learned counsel for the 1st and 2nd respondents further submitted that the settlor was the natural guardian of the plaintiff and he was also in enjoyment of the property and hence, the requirement to specifically hand over the property to the plaintiff or their mother, does not arise in the facts of the present case. To substantiate this submission, the learned counsel relied upon the following Judgments:

- a) Asokan Vs. Lakshmikutty and Ors reported in 2008 (1) MLJ 193.
- b) Boovaragamoorthy and Ors Vs. Sivamala reported in MANU/TN/5214/2018.
- c) Sarojini Ammal Vs. Krishnaveni Ammal reported in MANU/TN/0540/1988.
- d) K. Balakrishnan and ors. Vs. K. Kamalam and Ors 2004 (1) MLJ 171.
- e) Ponnuchami Servai Vs. Balasubramanian and Ors reported in 1981 (2) MLJ 455.

16. The learned counsel further submitted that there is no necessity to seek for declaration of title since there was no cloud on the title of the plaintiff by virtue of Ex.B-1. To substantiate this submission, the learned counsel relied upon the Judgement in B.K. Rangachari and Ors. v. L.V. Mohan reported in 2015 2 CTC 465.

17. This Court has carefully considered the submissions made on either side and the materials available on record. This Court has also carefully gone through the findings rendered by both the Courts below.

18. A careful reading of the findings of both the Courts below shows that they have carefully gone through the contents of Ex.B-1 (Ex.A-1) and held that it is a Settlement Deed executed by the 1st defendant in favour of the mother of the plaintiff and she was given life estate and the vested remainder was given in favour of the children born to them. The Courts below found that till the demise of the mother of the plaintiff, the 'A' schedule property was in possession and enjoyment of all the family members.

19. For the first time in the Second Appeal, a plea has been taken to the effect that Ex.B1 is a will and not a Settlement Deed. This stand was not taken by the 1st defendant in the written settlement and the specific stand taken was that the Settlement Deed was not acted upon. Therefore, the appellants



cannot be permitted to take this fresh plea in the Second Appeal. In any case, this Court finds that Ex.B-1 created a right in favour of the first wife Rajammal in praesenti and she was given a life estate and vested remainder was given to the children. The contents of Ex.B-1 also shows that the 1st defendant had completely divested his interest in the 'A' schedule property. Hence, the first substantial question of law is answered against the appellants.

20. This Court concurred with the findings of both the Courts below and found that Ex.B-1 is a Settlement Deed. This Settlement Deed was unilaterally cancelled after nearly 31 years by the 1st defendant. Such unilateral cancellation is per se illegal since the 1st defendant did not reserve or withhold any right in the 'A' schedule property. Hence, the cancellation deed, Ex.B-2 does not have any sanctity in the eye of law and it is a document which is void ab initio. Since it has been held to be a document void ab initio, there is no requirement in law to seek for a declaration and this document can be completely disregarded even in collateral proceedings. The second substantial question of law is answered accordingly against the appellants.

21. Insofar as the plea taken by the 1st defendant as if Ex.B-1 was not acted upon and it was only a nominal document, the 1st defendant seems to be placing strong reliance on the fact that he was in possession of the original document pertaining to the property and that the patta continued to stand in his name. While dealing with this issue, both the Courts below have taken into consideration the relationship between the parties and also of the fact that the 1st defendant was the natural guardian of the plaintiff and the 2nd defendant. The Courts below also took into consideration the fact that the property was enjoyed by all the family members till the demise of the first wife Rajammal. Therefore, it was held that the non-delivery of the possession of the property by the 1st defendant does not have any impact on the Settlement Deed executed by the 1st defendant.

22.

22. At this juncture, it will be relevant to take note of some of the Judgments relied upon by the learned counsel for the 1st and 2nd respondent. The 1st Judgment is the Judgment of the Hon'ble Supreme Court in Asokan case, referred supra. The relevant portions in the judgment are extracted hereunder:

"14. While determining the question as to whether delivery of possession would constitute



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acceptance of a gift or not, the relationship between the parties plays an important role. It is not a case that the appellant was not aware of the recitals contained in deeds of gift. The very fact that the defendants contend that the donee was to perform certain obligations, is itself indicative of the fact that the parties were aware thereof. Even a silence may sometime indicate acceptance. It is not necessary to prove any overt act in respect thereof as an express acceptance is not necessary for completing the transaction of gift.

20. Section 91 of the Indian Evidence Act covers both contract as also grant and other types of disposal of property. A distinction may exist in relation to a recital and the terms of a contract but such a question does not arise herein inasmuch as the said deeds of gift were executed out of love and affection as well as on the ground that the donee is the son and successor of the donor and so as to enable him to live a good family life.

21. Could they now turn round and say that he was to fulfill a promise? The answer thereto must be rendered in the negative. It is one thing to say that the execution of the deed is based on an aspiration or belief, but it is another thing to say that the same constituted an onerous gift. What, however, was necessary is to prove undue influence so as to bring the case within the purview of Section 16 of the Indian Contract Act. It was not done. The deeds of gift categorically state, as an ingredient for a valid transaction, that the property had been handed over to the donee and he had accepted the same. In our opinion, even assuming that the legal presumption therefore may be raised, the same is a rebuttable one but in a case of this nature, a heavy onus would lie on the donors.

22. Keeping in view the relationship of the parties and further in view of the fact that admittedly the appellant had not been residing in India for a long time, neither the possession of the document nor the payment of tax nor non-mutation of the name by itself would be sufficient to show that the execution of the deeds of gift by the defendants was not voluntary acts on their part. It can never be the intention of a son to drive away the parents



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from the house as soon as the deeds of gift are executed. Parents while gifting the property to a successor out of love and affection as also with a view to enable him to live a peaceful life, would not like to lose both the property as also their son."

23. The next judgment is the Judgment of this Court in Boovaragamoorthy case, referred supra. The relevant portions are extracted hereunder:

"16. The last part of Section 127 indicates that minor donee, who can be said to be in law incompetent to contract under Section 11 of the Contract Act is however, competent to accept a non onerous gift.

17. It is also clear from the records that the donee was aged about 17 years on the date of settlement deed Ex. A2 and her father was also present with her at the time of settlement. In fact, the first appellant/donor had married the donee and he has indicated the donee as his wife in the settlement deed itself. The first appellant was aged 42 years on the date of the second marriage and he divorced his first wife, before marrying the respondent/defendant. The marriage between the first appellant/respondent was said to be solemnized on 03.10.1993. The donee was an educated lady aged 17 years on the date of settlement deed and it is also admitted by both the parties. She is presently working as a nurse in a hospital. Therefore, the knowledge of settlement deed Ex. A2 to the father of the donee and the donee is sufficient to indicate acceptance of gift by minor herself. The settlement deed was revoked much later on 05.07.1994 through a revocation deed Ex. A3. By that time, the donee had become a major and she never repudiated the gift.

18. The contention of the learned counsel appearing for the appellants is that the possession of the property settled in favour of the respondent/defendant was not handed over to the respondent/defendant. In the instant case, the relationship between the parties should be taken into account. The first appellant (donor) is the husband of the donee. The possession if any held by the donor, after the execution of the settlement deed Ex. A2, can only be construed as possession on



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behalf of the donee, who was a minor at the time of the execution of the settlement deed. It is also relevant to point out that the plaintiff in the instant case has prayed for recovery of possession and also for mesne profits from the respondent/defendant, which shows that the defendant is in possession of the suit property. Her specific contention is that patta was transferred in her name subsequent to the execution of the settlement deed.

19. It is also relevant to note that in the cancellation deed dated 05.07.1994(Ex. A3), it is not mentioned by the donor that the donee did not accept the gift. On the contrary, it is mentioned that the donee, the respondent did not live with him, subsequent to the marriage and therefore, he cancelled the gift. Therefore, it has to be presumed that the donee had accepted the gift and such acceptance is also confirmed by her by not repudiating the gift on attainment of majority.

20. It is true that in every gift, the donor has a particular motive or a reason to part with his property in favour of the donee. In most of the cases, love and affection towards the donee would be the sole criterion. Merely because the marriage did not take place between the first appellant and the respondent on the date of settlement, the settlement deed cannot be simply thrown out, especially when the donor had referred the donee as his wife. Therefore, his intention is clear from the recitals of settlement deed Ex. A2 that he wanted to benefit his second wife.

21. It is also settled law that a child can take property in any manner whatsoever either under intestate (having made no legal will) or by Will or by purchase or gift or other assurance, except where it is clearly to his/her prejudice to do so. The first appellate court had analysed the entire evidence on record and had come to the conclusion that the plaintiff/first appellant is not entitled for declaration of his title over the suit property and for recovery of possession of the suit property from the respondent/defendant. The reasons assigned by the first appellate court is well sounded and I do not see any reason to interfere with the findings of the first appellate court."



24. The next judgment relied upon is Sarojini Ammal case, referred supra. The relevant portion is extracted hereunder:

"3. Eschewing the above contention, there is a need to consider the question of conferment of title, claimed by the plaintiffs as per Ex.B4 in respect of item 1 on the ground that Ex.B4 was accepted and was acted upon and hence it could not be revoked as per Ex.B42 and there could not be a subsequent sale as per Ex.B99. In this connection, three documents require advertence to and consideration by this Court. One is the deed of settlement itself by the first-plaintiff in favour of the second-plaintiff and that is Ex.B4 dated 25-1-1954. The first-plaintiff, as stated above, executed a deed of revocation on 6-4-1962, as per Ex.B42 and that was followed up by a sale deed in favour of the first-defendant on 14-6-1963 as per Ex.B99. If the settlement deed Ex.B4 had been accepted by the settlers, then the settlement was complete and in the absence of a power of revocation reserved for the settler, to be exercised by him, on specified contingencies and not on the mere Will of the settler, the settlement cannot be revoked. This is the implication of S.126 of the Transfer of Property Act, hereinafter referred to as the Act. Admittedly, no such power was reserved for the first-plaintiff in Ex.B4. If this is so, the revocation under Ex.B42 dated 6-4-1962 and the subsequent sale under Ex.B99 dated 14-6-1963 could have no sanctity in the eye of law and they have to stand ignored. That was why the defendants would advance a contention that there was no acceptance of the settlement by the settlees, and further more, it was not acted upon at all. The primary settlee under Ex.B4 was the second-plaintiff. She was the wife of the first-plaintiff and the mother of the other settlees, namely, plaintiffs 3 to 6 and the first-defendant. Whether there was an acceptance of the settlement has to be inferred from the facts and circumstances of each case, the law has not prescribed any particular form of acceptance. It is permissible for the Court to draw a presumption of acceptance from the conduct of the parties and from the factual materials, exposed in the case, and this is a presumption of fact. Merely because there was no formal parting with or handing over of the



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settlement deed by the settlor to the settlee is not a factor by itself to be counted against acceptance of the settlement, especially when the parties stand in a peculiar relationship and when they were found to be living together. Now we find that the settlor was none else than the husband of the primary settlee and the father of the other settlees. The husband and wife were admittedly living together at the relevant point of time. Hence this is not a case where there should be insistence of formal proof of acceptance or declaration of acceptance of the settlement from the settlees. This Court can certainly infer acceptance from the facts and circumstances of the case."

25. The last judgment that was relied upon is the Judgment is Ponnuchami Servai case, referred supra. The relevant portions of the Judgment are extracted hereunder:

"9. The contention of the learned counsel for the appellant that there was no acceptance of the gift has been negatived in the court below. Whether there was acceptance or not essentially a question of fact and the finding of the court below that there was acceptance is binding on me.

10. Even assuming that I could go into the question of acceptance; I see no reason to differ from the conclusion of the court below. The non-acceptance would strike at the root of the validity of the deed. If there was no acceptance, there was no need for the first defendant to execute a deed of revocation on 7-5-1974. Further the circumstances in which the first defendant was placed go to show that the whole idea was to see that the properties were saved for the family. Such a purpose cannot be effectuated by execution of a sham or nominal document. The plaintiff was a minor and the acceptance of the settlement can only be by his guardian. After the Hindu Minority and Guardianship Act, 1956, there can be no doubt that the father alone could be the guardian of the person as well as the property of a minor. It is only after him that the mother can be the guardian. Unfortunately, there is a general notion that in a document executed by the father in favour of a minor issue, somebody else has to be appointed as a guardian and the mother is referred to as the guardian in such cases. But this



is a lay and erroneous notion. The acceptance, on the facts here can only be by the father as the guardian of the minor and when he himself executed a document, the acceptance can be presumed."

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In Alapati Venkataramayya v. Alapati Nagamma MANU/TN/0212/1931 : AIR1932Mad272 , there was a gift of a house by the to her son and his wife. The son and the wife were minors. The donees and the parents of the husband of the donor continued to live in the house. It was held that the acceptance of the gift should be inferred unless the contrary was proved, and that the mere circumstance that the mother retained custody of the deed and kept the house in her name in the Municipal records and paid taxes did not show that she did not intend the gift to be acted upon. In the present case also, the father was the only person who could have accepted the gift, and the parties were continuing to stay together even after the gift. In these circumstances, the finding of the court below that there was acceptance is unexceptionable."

26. A careful reading of all the above Judgements would show that while looking into the issue of delivery of possession after a gift or Settlement Deed is executed, the relationship between the parties plays an important role. It is not in every case where there is no specific handing over of possession, the Settlement Deed can be held not to have been acted upon. If the parties have been living together and enjoying the property, as is found in the present case, the delivery of possession or the acceptance of the property must be inferred from the document itself. There is absolutely no doubt in the mind of this court that there was a valid Settlement Deed executed by the 1st defendant and it was acted upon. If really Ex.B-1 was not acted upon, there was no requirement for the 1st defendant to have cancelled the document after 31 years through Ex.B-2. This very act of the 1st defendant in bringing about a cancellation deed, shows that Ex.B-1 was acted upon and the 1st defendant wanted to interfere with the same. The courts below were perfectly right in rendering a finding to the effect that Ex.B-1 is binding upon the 1st defendant and it was acted upon.

27. Insofar as the argument to the effect that the relief of recovery of possession without claiming for declaration of title is not maintainable, has no force. A relief for declaration of title becomes necessary only if a cloud is created on the title to the property. In the present case, the



mother of the plaintiff was given the life estate and vested remainder was given to the children and the 1st defendant completely divested his interest in the 'A' schedule property and hence, there is no cloud over title insofar as the 'A' schedule property is concerned. Hence, the plaintiff is entitled to seek only for the relief of possession. The third question of law is answered accordingly against the appellants.

28. In view of the above discussion, this Court does not find any ground to interfere with the Judgments of both the Courts below and accordingly, this Second Appeal stands dismissed. Considering the facts and circumstances of the case, the parties shall bear their own costs. Consequently, connected miscellaneous petitions are closed.

s/d-
Assistant Registrar

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Sub-Assistant Registrar

KP

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Chengalpattu.

2.The Principal Subordinate Judge,
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Second Appeal No.130 of 2013

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