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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.02.2022

CORAM:

THE HONOURABLE MR. JUSTICE N.ANAND VENKATESH

SA.No.34 of 2013

1. R.Nagarajan
2. N.Annalakshmi ... Appellants/Defendants 5 & 6
Vs.

1. A.Ramasamy Gounder
2. A.Nallaiya Gounder ... 1&2 Respondents/Plaintiffs

3. P.Anbu Ezhil

4. C.Ayyavoo

5. T.A.Natarajan

6. Pavayammal ... 3 to 6 Respondents/ 1 to 4 Defendants

7. N.Dhanasekaran

8. V.Selvam

(R7 & 8 Impleaded vide order 28.07.2015 in
MP No.2/13 in SA No.34 of 2013 .. Respondents 7 &8
Respondents 3 to 6 - Exparte

Prayer: Second Appeal filed under section 100 of the Code of Civil Procedure against the judgment and decree of the learned Principal District Judge, Namakkal dated 24.11.2012 made in A.S.No.12 of 2012 reversing that of the learned Subordinate Judge, Rasipuram dated 06.02.2012 made in O.S.No.185 of 2008 (OS No.282/2006, Sub Court, Namakkal).

For Appellant : Mr.R.Karthikeyan
For Respondents: Mr.C.Jagadish for R1, 2, 6
Mr.N.Manokaran for R7 and R8

JUDGMENT

The defendants 5 and 6 are the appellants in this second appeal.

2. The respondents 1 and 2 / plaintiffs filed a suit



seeking for the relief of partition and for allotment of 1/4th share in the suit property.

3. The case of the plaintiffs is that they are the brothers of the defendants 3 and 4. The 1st defendant is the son of the 4th defendant and the 2nd defendant is the agreement holder from the 1st defendant. According to the plaintiffs, the suit properties belonged to one Athayammal. She is none other than the sister of the plaintiffs and the defendants 3 and 4. The said Athayammal executed a Will dated 10.09.1971 bequeathing the suit properties to the plaintiffs and Defendants 3 and 4 to be enjoyed by them equally after her life time.

4. The further case of the plaintiffs is that the 1st defendant in a clandestine manner managed to get a Sale deed executed in his favour by Athayammal on 26.07.2006. According to the plaintiffs, the sale deed was obtained under suspicious circumstances and four days prior to the death of the said Athayammal. Thereafter, the 1st defendant entered into a Sale agreement with the 2nd defendant.

5. The plaintiffs took a stand that the sale deed is fraudulent and there was already a registered Will executed by the said Athayammal and based on the said Will, the plaintiffs sought for the relief of partition and for allotment of 1/4th share to each of the plaintiffs.

6. The 1st defendant took a stand that on the execution of the sale deed in his favour by Athayammal, the Will no longer survives and hence, the plaintiff is not entitled for any share in the suit property. The 1st defendant also took a stand that the sale deed executed in his favour by Athayammal was not put to challenge at any point of time and hence, sought for the dismissal of the suit.

7. The Trial Court on appreciation of the oral and documentary evidence, came to a conclusion that the Will executed by Athayammal automatically ceased to exist on the execution of the sale deed in favour of the 1st defendant and since this Sale deed has not been challenged, the relief sought for by the plaintiff cannot be granted and accordingly, the suit came to be dismissed.

8. The plaintiff filed an appeal before the Principal District Judge, Namakkal, and the Lower Appellate Court by a judgment and decree dated 24.11.2012 allowed the appeal and set aside the judgment and decree of the Trial Court. Thereby, the suit was decreed as prayed for. Aggrieved by the same, the present second appeal has been filed before this Court.



9. This Court framed the following substantial questions of law :-

"1. Whether the Lower appellate Court is right in holding that the suit, in the absence of prayer for cancellation of the sale deed dated 26.07.2006, a certified copy of which was produced as Ex.A3, was maintainable?

2. Whether the Lower Appellate Court is right in non-suiting the appellants on the ground of non-production of the original sale deed dated 26.07.2006, when the execution of the same had not been specifically denied.

3. Whether the Lower appellate Court has committed an error in holding that the compliance with the requirements stipulated in Section 68 of the Indian Evidence Act was not necessary for the proof of Ex.A1 Will?

10. Heard the learned counsel for the Appellants and Respondents and this Court also carefully considered the materials available on record and the findings rendered by the Lower Appellate Court.

11. In the present case, the Trial Court took pains to analyze the entire evidence in order to come to a conclusion that the plaintiffs will not be entitled to rely upon the Will by virtue of the execution of the Sale Deed by Athayammal on 26.07.2006 in favour of the 1st defendant. The Trial Court also found that the suit itself cannot be maintained without challenging the sale deed executed in favour of the 1st defendant. The trial Court also independently assessed the genuineness of the Will and found that the plaintiffs failed to prove the genuineness of the Will. The trial Court also found that the plaintiffs were not in possession and enjoyment of the suit property.

12. The Appellate Court without assigning any valid reasons has proceeded to allow the appeal even without a discussion on the findings of the trial court. The slip shod manner in which the Appellate Court had rendered the judgment is apparent when a finding is given as if the 1st defendant did not produce the sale deed dated 26.07.2006. The Lower Appellate Court did not even know that this Sale deed was marked as Ex.A3. The findings of the Lower Appellate Court are bereft of details and at the best, this Court can only come to a conclusion that there was no objective satisfaction and what is found is the subjective satisfaction of the Appellate Court. This completely goes against the spirit of Section 96 of CPC.

13. The Lower Appellate Court did not even take into consideration the fact that there was no prayer for cancellation



14. The plaintiffs had claimed that the sale deed was obtained by the 1st defendant in a clandestine manner from Athayammal. There is no dispute with regard to the fact that Athayammal had executed the sale deed and it was a registered document. If the plaintiffs had any grievance on this document, they ought to have challenged this document, since at the best this document can only be termed as a voidable document.

22. Thus the expressions "void and voidable" have been the subject-matter of consideration on innumerable occasions by courts. The expression "void" has several facets. One type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab initio void and for avoiding the same no declaration is necessary, law does not take any notice of the same and it can be disregarded in collateral proceeding or otherwise. The other type of void act, e.g., may be transaction against a minor without being represented by a next friend. Such a transaction is a good transaction against the whole world. So far as the minor is concerned, if he decides to avoid the same and succeeds in avoiding it by taking recourse to appropriate proceeding the transaction becomes void from the very beginning. Another type of void act may be which is not a nullity but for avoiding the same a declaration has to be made. Voidable act is that which is a good act unless avoided, e.g., if a suit is filed for a declaration that a document is fraudulent and/or forged and fabricated, it is voidable as the apparent state of affairs is the real state of affairs and a party who alleges otherwise is obliged to prove it. If it is proved that the document is forged and fabricated and a declaration to that effect is given, a transaction becomes void from the very beginning. There may be a voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and not any day prior to it. In cases where legal effect of a document cannot be taken away without setting aside the same, it cannot be treated to be void but would be obviously voidable.



16. It is clear from the above judgment that only in those cases where the document is void ab initio, it can be disregarded. In the present case, the document was executed by a person who had a right over the property. However, the plaintiffs are questioning the circumstances under which this document was executed by Athayammal four days prior to her death. Under such circumstances, this document only becomes voidable and such a voidable transaction requires to be set aside, if a party wants to avoid such a document. In the absence of the same, that document can never be disregarded.

17. In the present case, the plaintiffs were aware about the existence of the sale deed even when the reply notice was given before the suit was instituted. In spite of the same, the plaintiffs choose not to challenge this document. Hence, the plaintiffs will have to face the consequences.

18. The Will that was executed by Athayammal and which was marked as EX.A1, gets automatically cancelled by virtue of the sale deed executed by Athayammal, marked as Ex.A4. The Will can always be cancelled either expressly or through the conduct of the party during the life time of the executor of the Will. The Sale deed executed by Athayammal in favour of the 1st defendant, automatically canceled the Will that was executed earlier.

19. In view of the above discussion, the Lower Appellate Court was not right in allowing the suit, in the absence of a prayer for cancellation of the Sale deed dated 26.07.2006. The 1st substantial question of law is answered accordingly.

20. Insofar as the 2nd substantial question of law is concerned, there was no dispute with regard to the execution of the sale deed dated 26.07.2006 by Athayammal in favour of the 1st defendant. Hence, the non production of the original document does not in any way affect or take away the rights which flowed in favour of the 1st defendant in the suit property. Admittedly, the certified copy was available before the Court and the plaintiffs did not dispute this document. The 2nd substantial question of law is answered accordingly.

21. Insofar as the 3rd substantial question of law is concerned, there is no need to answer this question, since the proof of Will marked as Ex.A1, pales into insignificance since it is deemed to have been canceled by virtue of sale deed executed by Athayammal in favour of the 1st defendant.

22. In view of the above discussion, all the substantial questions of law are answered in favour of the appellants. This Court has absolutely no hesitation to interfere with the



judgment and decree of the Lower Appellate Court in A.S.No.12 of 2012 and accordingly, the same is hereby set aside. The judgment and decree of the Trial Court made in O.S.No.185 of 2008 dated 06.02.2012 is restored and the suit is dismissed.

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23. In the result, this second appeal is allowed. Considering the facts and circumstances of the case, the parties shall bear their own costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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To

1.The Principal District Judge, Namakkal

2.The Subordinate Judge, Rasipuram.

3.Copy To:-

The Section Officer

VR Section, High Court

Madras.

+lcc to Mr.C.Jagadish, Advocate, S.R.No.12091

+lcc to Mr.R.Karthikeyan, Advocate, S.R.No.11638

SA.No.34 of 2013

CA(CO)

CT 25/05/2022