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S.A.No.100 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.10.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.No.100 of 2017
and
CMP.No.2014 of 2017

1.S.Kumarasamy (Died)

2.Tamilselvi

3.Vigneswaran

4.Naveeneshwaran

...Appellants

(sole appellant died appellants

2 to 4 brought on record as LR's

of the deceased sole appellant

viz., Kumarasamy vide Court order

dated 15.06.2021 made in

CMP.Nos.8086, 8087 & 8088/2021

in S.A.No.100 of 2017)

Vs.

1.P.Saravanan

2.S.Raja

3.Chellammal

...Respondents

Prayer: Second Appeal filed under Section 100 of the Code of Civil

Procedure, against the judgment and decree passed in A.S.No.67 of 2013 dated



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24.03.2016 on the file of the Sub-Court, Namakkal, confirming the judgment and decree passed in O.S.No.1498 of 2004 dated 15.07.2013 on the file of the Additional District Munsif Court, Namakkal.

For Appellants : Mr.P.Navaneethakrishnan

For Respondents : Mr.S.Senthil for R1
No appearance – R2
Mr.M.Premkumar for R3

JUDGMENT

The first defendant in the suit is the first appellant. The first respondent filed a suit for partition claiming 1/12th share in the suit property. The suit was decreed by the trial Court. The appeal filed by the first defendant was also dismissed. Aggrieved by the concurrent findings of the Courts below, the first defendant has come by way of this Second Appeal. Pending Second Appeal the first defendant died and his legal representatives were brought on record as appellants 2 to 4.



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2. According to the first respondent/plaintiff the suit property

originally belonged to maternal grand father of the plaintiff namely one Sellappan @ Sellappa Gounder @ Sevitturaja. The first defendant in the suit/first appellant and the second respondent/second defendant are the sons of the said Sellappan through his second wife Sellammal. The third defendant in the suit namely, the third respondent is the daughter born to said Sellappan through his first wife Kaliyammal. The first respondent/plaintiff is the son of the third respondent Chellammal. After birth of the third respondent her mother and the first wife of Sellappan passed away. Hence, Sellappan married another Sellammal as his second wife. The appellant and the second respondent are the sons born to the second wife of Sellappa Gounder. The suit properties are the ancestral properties of the said Sellappan and after his death his 1/3rd share in the property devolved on his sons namely the first appellant and the second respondent. The third respondent his daughter and his second wife Sellammal are entitled to 1/12th share each. The second wife of Sellappan namely Sellammal executed a gift deed on 19.04.2004 in favour of the plaintiff in respect of her 1/12th share in the suit property. Thus, the plaintiff claims 1/12th share in the suit property and laid the present suit seeking preliminary decree for partition.



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3. The appellant/first defendant filed a written statement and raised a plea that the second wife of Sellappan namely Sellammal orally released her 1/12th share in his favour even before the execution of gift settlement deed in favour of the first respondent. Therefore, it is his specific case that Sellammal had no right over the property at the time of execution of gift settlement deed in favour of the first respondent.

4. The appellant also filed additional written statement raising a plea that the gift deed in favour of the first respondent/plaintiff was obtained by misrepresentation. The second respondent/second defendant filed a written statement agreeing for partition. The third respondent/third defendant filed a written statement claiming equal share along with her brothers namely, the appellant and the second respondent by virtue of Central Act 39 of 2005.

5. At the time of trial, the first respondent was examined as PW1 and attetstor to the gift deed relied on by him, which was marked as Ex.A1, was examined as PW2. Five documents were marked on behalf of the first respondent as Ex.A1 to Ex.A5. The appellant and the third respondent were examined as DW1 & DW5. The appellant also examined three other witnesses



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as DW2 to DW4. One document was marked as Ex.B1 on the side of the appellant.

6. The trial Court on appreciation of oral and documentary evidence came to the conclusion that the first respondent/plaintiff succeeded in proving the execution of gift deed in his favour by Sellammal. Therefore, the trial Court granted a decree for partition 1/12th share in favour of the first respondent. Aggrieved by the same, the appellant herein filed an appeal in A.S.No.67 of 2013 on the file of the Sub Court, Namakkal. The first Appellate Court concurred with the findings of the trial Court and dismissed the appeal. Aggrieved by the concurrent findings, the first defendant has filed this Second Appeal.

7. At the time of admission, this Court formulated the following substantial questions of the law:

“1. Whether the Courts below are right in law decreeing the suit for partition when the settlement deed marked as Ex.A1, based on which the right to the suit property is claimed by the first respondent, stood cancelled by Ex.B1?



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2. *Whether the Courts below are right in law in decreeing the suit even without framing any issue as to pleading raised in the additional written statement that the settlement deed in favour of the plaintiff has been cancelled and rendering a finding upon it?*

3. *Whether the Courts below are right in law in decreeing the suit when the plaintiff had failed to discharge the burden cast upon him to prove that settlement deed was not obtained fraudulently by examining the author of Ex.A1 especially when it is pleaded that the plaintiff get Ex.A1 fraudulently?"*

8. The learned counsel appearing for the appellant submitted that the first respondent failed to prove execution of Ex.A1 deed by any acceptable evidence. The learned counsel further submitted that the property covered by the gift deed is situated at Muthalaipatti Village, Namakkal Taluk. However, the document was typed by a Typist at Bhavani. The Courts below without taking into consideration the factual aspect erroneously came to the conclusion that the first respondent proved the execution of gift deed. The learned counsel further submitted that the appellant raised a specific plea in the additional written statement regarding the cancellation of the gift deed executed in favour



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of the first respondent and the misrepresentation employed by the first respondent at the time of execution of gift deed in his favour and the same had not been considered by the Courts below.

9. The learned counsel for the contesting first respondent by taking this Court to the evidence of PW1 & PW2 submitted that the execution of gift deed has been proved by the first respondent by leading acceptable evidence. The learned counsel further submitted that the Courts below on appreciation of evidence of attesor to Ex.A1 had given factual findings that the execution is proved. Therefore, the appellants have not made out any case to interfere with the concurrent findings of the Courts below.

10. The first respondent/plaintiff filed the present suit for partition based on the gift deed executed by his grand father's second wife Sellammal. In order to prove the execution of gift deed he examined one Jeevanantham, who attested the gift deed. The attesor to Ex.A1 in his evidence clearly deposed that at the time of execution of gift deed in favour of the first respondent, the settlor namely, Sellammal was in sound state of mind and she voluntarily executed the documents.



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11. In the original written statement filed by the appellant on 28.03.2005 the appellant had not pleaded any misrepresentation on the part of the first respondent. On the contrary, he raised a specific plea that Sellammal orally released her share in favour of his father and therefore, he disputed title of Sellammal to execute a gift deed on the date of execution of the document. The plea of misrepresentation was not at all raised in the original written statement filed by the appellant. The plea of misrepresentation was raised by the appellant only in his additional written statement which was filed on 29.11.2011.

12. In the mean time, the settlor of the plaintiff namely Sellammal executed a document on 25.05.2010 cancelling the settlement deed in favour of the plaintiff. Unilateral cancellation of gift deed is unknown to law. In the gift deed executed by Sellammal in favour of the first respondent/plaintiff she had not reserved her right to cancel the gift deed. Therefore, the subsequent cancellation of the gift deed by Sellammal pending present suit has no legal sanctity and the same has to be ignored. Further, there is no whisper about the alleged misrepresentation in the cancellation deed executed by Sellammal on



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25.05.2010. For the first time only in the additional written statement, the appellant raised the plea of misrepresentation. It is settled law that when a person alleges misrepresentation it is for him to prove the same by leading a cogent evidence.

13. In the case on hand, the appellant failed to prove the plea of misrepresentation by leading any acceptable evidence. First of all, he failed to mention about the misrepresentation in the original written statement. Secondly, in the cancellation deed executed by Sellammal, there is no whisper about the alleged misrepresentation. Hence, in such circumstances, the plea of misrepresentation raised by the appellant in his additional written statement is not acceptable to this Court in the absence of convincing evidence. Therefore, the conclusion reached by both the Courts below based on the appreciation of attesor's evidence that execution of Ex.A1 gift deed in favour of the first respondent was proved need not be interfered with. Once this Court comes to the conclusion that Ex.A1 gift deed in favour of the first respondent is a valid document, he is entitled to 1/12th share in the suit properties.



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14. The third respondent herein raised a plea by claiming equal share in the suit property by virtue of Act 39 of 2005. Since 1/12th share of Sellammal was gifted to the first respondent by registered document even prior to coming into force of the said Act, the Courts below has rejected the plea raised by the third respondent. The third respondent being satisfied with the decree has not chosen to file any appeal. In these circumstances, the said finding of the Courts below also need not be disturbed. In view of the discussions made earlier, all the substantial questions of law are answered against the appellant and consequently, the Second Appeal is dismissed by confirming the judgment and decree passed by the Courts below.

15) a) In the result, the Second Appeal stands dismissed by confirming the judgment and decree passed by the First Appellate Court.

b) In the facts and circumstances of the case, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

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Index : Yes/No
Internet : Yes/No
Neutral Citation Case : Yes/No
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To

- 1.The Sub-Court, Namakkal.
- 2.The Additional District Munsif Court, Namakkal.



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