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S.A.Nos.379 and 380 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.10.2023

CORAM

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A.Nos.379 and 380 of 2017
and C.M.P.No.8863 of 2017

S.A.No.379 of 2017:

1.C.Lakshmi

2.C.Janaki

3.C.Madhanraj (died)

4.Meena

5.Minor Akash

Rep by his next friend/mother/natural guardian
S/o. C.Madhanraj

6.Minor M.Delfina Angel

Rep by her next friend/mother/Natural guardian
D/o. C.Madhanraj

... Appellants

(A4 to A6 bring on record as Legal Representatives of the deceased A3 viz., C.Madhanraj vide Court order dated 21.02.2022 made in C.M.P.Nos.12217 and 12236 of 2021 in S.A.Nos.379 and 380 of 2017)

vs.

1.A.Gowri

1/16



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2.A.Kavitha

3.Amul

4.Jyothi

... Respondents

PRAYER: Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the Judgment and decree dated 07.10.2016 passed in A.S.No.83 of 2015 on the file of the XV Additional City Civil Judge, Chennai confirming the Judgment and decree dated 24.11.2014 made in O.S.No.6392 of 2012 on the file of XVI Assistant City Civil Judge, Chennai.

For Appellants : Mr.S.Mukunth
Senior Counsel
for Mr.K.Venkatasubban

For Respondents : No Appearance

S.A.No.380 of 2017:

1.C.Lakshmi

2.C.Janaki

3.C.Madhanraj (died)

4.Meena

5.Minor Akash

Rep by his next friend/mother/natural guardian
S/o. C.Madhanraj



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6.Minor M.Delfina Angel

Rep by her next friend/mother/Natural guardian

D/o. C.Madhanraj

... Appellants

(A4 to A6 bring on record as Legal Representatives of the deceased A3 viz., C.Madhanraj vide Court order dated 21.02.2022 made in C.M.P.Nos.12217 and 12236 of 2021 in S.A.Nos.379 and 380 of 2017)

VS.

1.C.Saraswathi

2.A.Gowri

3.A.Kavitha

4.Amul

5.Jyothi

... Respondents

PRAYER: Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the Judgment and decree dated 07.10.2016 passed in A.S.No.84 of 2015 on the file of the XV Additional City Civil Judge, Chennai confirming the Judgment and decree dated 24.11.2014 made in O.S.No.4864 of 2012 on the file of XVI Assistant City Civil Judge, Chennai.

For Appellants : Mr.S.Mukunth
Senior Counsel
for Mr.K.Venkatasubban

For Respondents : No Appearance



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COMMON JUDGEMENT

WEB COPY These second appeals are arising out of suit for partition and suit for declaration that the Settlement Deed allegedly executed by the appellants in favour of the 1st respondent is null and void and for consequential injunction.

2. The appellants herein filed a suit for partition claiming 1/6 share in the suit property in O.S.No.6392 of 2012 on the file of the XVI Assistant City Civil Court, Chennai. The said suit was dismissed by the Trial Court and the findings of the Trial Court was confirmed by the First Appellate Court. Aggrieved by the concurrent findings against them, the appellants have filed S.A.No.379 of 2017.

3. The appellants also filed a suit for declaration that the Settlement Deed allegedly executed by them dated 07.03.2003 in favour of the 1st respondent was null and void and for consequential injunction restraining the respondents from interfering with their possession in O.S.No.4864 of 2012 on the file of the XVI Assistant City Civil Court, Chennai. The said suit was dismissed by the Trial Court and the findings of the Trial Court was



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affirmed by the First Appellate Court. Aggrieved by the same, the appellants have filed S.A.No.380 of 2017.

4. When the second appeals came up for hearing on 09.10.2023, there was no representation for the respondents. This Court after hearing the arguments of learned Senior Counsel appearing for the appellants, adjourned these matters to today (i.e.,11.10.2023) in order to give an opportunity to the respondents to putforth their arguments. Even today, when the matters are called, there was no representation for the respondents in the morning. Therefore, the matters are passed over and called in the afternoon. Even in the afternoon, there is no representation for the respondents. Therefore, this Court proceeds to dispose of these second appeals based on the materials available on record.

5. According to the appellants/plaintiffs, the suit property was purchased by father of the appellants 1 to 3 namely M.Chandrakesan in the name of appellants 1 to 3 and children of his second wife namely respondents 4 and 5 and deceased Maragatham. The children of the deceased Maragatham are arrayed as respondents 2 and 3. The second wife



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of M.Chandrakesan is arrayed as 1st respondent. Since the property was purchased in the name of appellants 1 to 3 and children of 1st respondent, the appellants are entitled to 1/6 share each in the suit property. It is specifically alleged by the appellants that the respondents created a Settlement Deed as if, the undivided share of the appellants were settled by them in favour of 1st respondent by executing a gift settlement on 07.03.2003. Since the said document was concocted and forged one, the appellants 1 to 3 were constrained to file a suit for declaration and injunction as mentioned above, apart from seeking the relief of partition.

6. The respondents herein filed a written statement and resisted the suits on the ground that the Settlement Deed was executed by appellants 1 to 3 out of their own wish and therefore, the appellants are not entitled to relief prayed for by them. The respondents also claimed that 1st respondent is the legally wedded wife of said M.Chandrakesan and mother of the appellants was not a legally wedded wife of M.Chandrakesan.

7. Before the Trial Court a simultaneous trial was conducted and common judgment was passed in both the suits. The 1st appellant was



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examined as PW.1 in both the suits. In the partition suit filed by the appellants 1 to 3 in O.S.No.6392 of 2012, 11 documents were marked on behalf of the appellants as Exs.A1 to A11. In the declaration and injunction suit filed by the appellants 1 to 3 in O.S.No.4864 of 2012, 7 documents were marked on behalf of the appellants as Exs.A1 to A7. On behalf of the respondents, no witnesses were examined and no documents were marked.

8. The Trial Court on appreciation of oral and documentary evidences available on record, came to the conclusion that appellants 1 to 3 failed to prove that Settlement Deed impugned by them was a forged document and consequently, by upholding the validity of the Settlement Deed dismissed both the suits. Aggrieved by the same, the appellants filed two appeals in A.S.Nos.83 and 84 of 2020 on the file of the XV Additional City Civil Court, Chennai. The First Appellate Court by affirming the findings of the Trial Court, dismissed both the appeals. Aggrieved by the same, the appellants are before this Court.

9. At the time of admission, my predecessor formulated the following substantial question of law:-



“(1) Whether the courts below are right in granting relief to the plaintiff on the basis of settlement deed, which is specifically disputed without even shifting the burden on the defendant to prove the settlement Deed by examining an attesting witness?”

10. After considering the question of law framed at the time of admission, this Court finds a typographical error in the question, therefore, it shall be read as follows:-

“(1) Whether the courts below are right in refusing relief to the plaintiff on the basis of settlement deed, which is specifically disputed without even shifting the burden on the defendant to prove the settlement Deed by examining an attesting witness?”

11. The learned Senior Counsel appearing for the appellants elaborating the substantial question of law framed at the time of admission, submitted that the Settlement Deed is a document, which requires attestation and hence, as per Section 68 of the Indian Evidence Act, 1872, the same can be proved only by calling one of the attester to the document. In the case on



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hand, the respondents, who claim right under the Settlement Deed failed to prove the same by examining any one of the attestor. In such circumstances, the Settlement Deed pressed into service by the respondents has not been proved in the manner known to law and consequently, both the Courts below ought not to have non-suited the appellants.

12. It is not in dispute the suit property was purchased in the name of the appellants 1 to 3, the respondents 4, 5 and deceased Maragatham. The legal representatives of deceased Maragatham are shown as respondents 2 and 3. With regard to purchase of the property in the name of appellants 1 to 3 and above mentioned respondents are not in dispute. The specific case of the respondents is that the appellants 1 to 3 already settled their undivided interest in the suit property in favour of the 1st respondent. In such circumstances, the person, who claims right under Settlement Deed has to prove the same. Only if the Settlement Deed under which the respondents are claiming right is proved in the manner known to law, the burden will shift to the appellants/plaintiffs to prove alleged forgery.



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13. Section 68 of the Indian Evidence Act, 1872, reads as follows:-

“68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[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 purpose to have been executed is specifically denied.]”

14. A reading of above provision would make it clear that if a document other than a Will which requires attestation is disputed by any person, the person, who claims right under the said document shall prove due execution of the same by calling any one of the attestor to the document. The Settlement Deed is a document, which requires attestation as per Section 123 of the Transfer of Property Act, 1882.



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15. A perusal of the pleadings of the parties would make it clear that the execution of the Settlement Deed was specifically disputed by the appellants in their pleadings. It is their specific stand that the respondents by committing forgery and impersonation concocted settlement deed in their favour as if, the same had been executed by the appellants 1 to 3. In such circumstances, it is incumbent on the respondents to prove due execution of Settlement Deed as per the provisions of Section 68 of the Indian Evidence Act, 1872, by calling any one of the attester to the document.

16. In the case on hand, the respondents failed to examine any witnesses and they also failed to produce any documents. It is stated that pending first appeal, the appellants filed an application in C.M.P.No.87 of 2015 for production of original of the Settlement Deed relied on by the respondents. The said application was considered by the First Appellate Court along with appeals and the same was also dismissed.

17. The Trial Court as well as the First Appellate Court by overlooking Section 68 of the Indian Evidence Act, 1872, erroneously casted the burden on the appellants 1 to 3 and observed that the appellants 1



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to 3 failed to prove the forgery pleaded by them. Even assuming the appellants 1 to 3 failed to prove the forgery pleaded by them, that will not confer any right on the respondents as they miserably failed to prove the Settlement Deed by examining one of the attessor to the document. The question of proving forgery will arise only if settlement deed is proved in the manner known to law.

18. This Court in *Beryl Dhinakaran vs. D. Albert* reported in **2016 (1) MWN (Civil) 518** and *Tamilkodi v. N. Kalaimani* reported in **2015 (4) CTC 771**, while considering the scope and ambit of Section 68 of the Indian Evidence Act, 1872, categorically held that it is the duty of the beneficiary of the Settlement Deed to prove the execution of the same by calling any one of the attessor to the document, especially when execution of settlement is disputed.

19. In the case on hand, as mentioned earlier, the respondents failed to prove the Settlement Deed dated 07.03.2003 in the manner known to law. In such circumstances, conclusion reached by both the Courts below that appellants are not entitled to relief prayed for on the assumption that the



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declaring 1/6 share each. As far as the prayer for mesne profits are concerned, the parties are relegated to the separate proceedings.

(ii) The Second Appeal in S.A.No.380 of 2017 is allowed by setting aside the judgment and decree passed by both the Courts below and the appellants/plaintiffs are entitled to declaration as prayed for. The appellants are also entitled to consequential relief of injunction against alienation as indicated above.

(iii) Consequently, the connected civil miscellaneous petition is closed.

(iv) In the facts and circumstances of these cases, there will be no order as to costs.

11.10.2023

Index : Yes
Speaking order : Yes
Neutral Citation : Yes
dm



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To

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- 1.The XV Additional City Civil Court,
Chennai.
- 2.The XVI Assistant City Civil Court,
Chennai.



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S.SOUNTHAR, J.

dm

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