



A.S.No.519 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.12.2023

CORAM

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

A.S.No.519 of 2017
and C.M.P.Nos.16940 of 2017 and 11072 of 2019

1. Shameemunnisa
2. Afsarunnisa ...Appellants

-Vs-

1. G.AyishaSiddiqa
2. Minor.Syed Suhail
represented by his mother and natural guardian
G.AyishaSiddiqa ... Respondents

Prayer: First Appeal filed under Section 96 of CPC and Order XLI Rule 1 of CPC, praying to set aside the Judgment and Decree passed by the Principal District Judge, Chengalpattu, Kancheepuram district in OS.No.175 of 2012 dated 18.07.2017.

For Appellants : M/s Karthikaa Ashok
For Respondents : Mr.T.M.Hariharan

JUDGMENT

This appeal suit has been filed as against the Judgment and Decree dated 18.07.2017 in OS.No.175 of 2012 passed by the Principal District Judge, Chengalpattu, Kancheepuram district, thereby decreed the suit



filed by the respondents.

2. The respondents are the plaintiffs and the appellants are the defendants. For the sake of convenience, the parties are referred to as per their ranking in the Trial Court.

3. The plaintiffs filed a suit for declaration declaring that the settlement deed executed by the late husband of the first plaintiff in favour of the first defendant dated 01.10.2010 as null and void and not binding on the plaintiffs. They also prayed for a declaration declaring that the suit property in their favour and delivery of vacant possession of the subject property.

4. The case of the plaintiffs is that the suit property is a self acquired property of the husband of the first plaintiff by the registered sale deed dated 15.05.1995 from one Sethuraman and his son S.Nataraj. The plaintiffs' family and the defendants are residing in the suit property. During the absence of the deceased husband of the first plaintiff, the



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defendants ill-treated the first plaintiff and she was driven out from the marital home. Thereafter, the first plaintiff filed a petition for maintenance in M.C.No.69 of 2004 and the same was dismissed as not pressed on 13.05.2004, in view of the settlement arrived at between them. The deceased husband of the first plaintiff was a drunkard and he was admitted into hospital. However, due to the death of the father of the first plaintiff, he was discharged from the hospital against medical advise. Again, he was admitted into hospital for various ailments. In the meanwhile, under coercion, the subject property was settled in favour of the defendants by the settlement deed dated 01.10.2010 by the late husband of the first plaintiff. Immediately after the settlement deed, the husband of the first plaintiff died on 23.11.2010. Though the plaintiffs had come to their house, they were ill-treated as strangers and they were sent out from the marital home. Thereafter, the defendants also lodged a complaint before the jurisdictional Police Station. Hence, the suit.



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5. Resisting the same, the respondents filed their written statement stating that the plaintiffs filed a suit suppressing the fact that they are receiving a sum of Rs.4,95,000/- from the NRI account through their bank by way of fixed deposit. Therefore, they having received the maintenance as full and final settlement, cannot challenge the settlement deed executed in favour of the defendants. The first plaintiff had never stayed with her husband in the marital home. When the husband of the first plaintiff was bed ridden, she did not care about him and he was admitted in hospital for various ailments. In fact, the suit property was purchased from the jewels belonging to the first defendant and after selling the jewels, the suit property was purchased in the name of the deceased husband, since he is elder in the family. Thereafter, the first plaintiff harassed her husband and deserted him. She never visited the suit property. Therefore, her husband settled the property in favour of the first defendant by the registered settlement deed dated 01.10.2010. Therefore, the suit itself is not maintainable and is also barred by limitation.



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6. After completion of pleadings, the Trial Court framed the following issues:-

“ 1. Whether the plaintiffs are entitled to the relief of declaration?

2. Whether the plaintiffs are entitled to the relief of possession?

3. Whether the plaintiffs are entitled to the relief of injunction?

4. To what relief the plaintiffs are entitled?

7. On the side of the plaintiffs, they had examined P.W.1 and marked Exs.A1 to 31. On the side of the defendants, no one was examined and no document was marked. On perusal of oral and documentary evidence, the Trial Court decreed the suit as prayed for.

8. The learned counsel for the defendants submitted that the Judgment and Decree passed by the Trial Court is liable to be set aside on two grounds. The Judgment and Decree passed by the Trial Court is under Order XVII Rule 2 of CPC. Though the defendants appeared before the Trial Court through their counsel and filed a written statement, when the suit was posted for cross examination of P.W.1, their counsel



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reported no instructions before the Trial Court. When the counsel reported no instructions before the Trial Court, the Trial Court ought to have issued notice to the defendants to verify whether they had instructed their counsel to report no instructions. Without issuance of notice to the defendants, the Trial Court, only on the basis of the submissions made by their counsel, mechanically decreed the suit. She also submitted that the settlement deed is legally valid and it was not challenged by way of any other ground. Though the plaintiffs had taken a specific stand that when he was taking treatment, under coercion the settlement deed was obtained, the plaintiffs failed to prove the same in accordance with law.

9. Per contra, the learned counsel for the plaintiffs would submit that the Trial Court had rightly passed the Judgment and Decree under Order XVII Rule 2 of CPC, since the defendants were not present at the time of cross examination of P.W.1 and their counsel also reported no instructions for cross examination of P.W.1. The defendants also failed to prove the settlement deed in accordance with law by examining any one of the attesting witnesses as contemplated under Section 68 of the



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Evidence Act. When the settlor was admitted into hospital for his continuous ailments and when he was discharged from the hospital against medical advise, the settlement deed obtained would obviously be under coercion. Therefore, the Trial Court had rightly decreed the suit and prayed for dismissal of this appeal suit.

10. Heard the learned counsel for the appellants and the learned counsel for the respondents and perused the materials available on record.

11. Having regard to the pleadings, evidence and submissions made by the learned counsel appearing on either side, the following points arise for consideration in this appeal:-

“(i) Whether the Judgment and decree passed by the Trial Court is sustainable under Order XVII Rule 2 CPC when the counsel for the defendants reported no instructions before the Trial Court?”

“(ii) Whether the settlement deed is proved before the Trial Court without complying the provisions under Section 68 of the Evidence Act?”

12. After completion of pleadings, the Trial Court posted the matter for trial on 06.03.2017. Thereafter, it was adjourned on several



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occasions and was finally posted on 11.04.2017. On 11.04.2017, there was a change of counsel for the plaintiffs and at last on 28.04.2017, the plaintiffs filed a proof affidavit and marked documents as Exs.A1 to 31 and the matter was posted for cross examination on 13.06.2017. On 13.06.2017, P.W.1 was partly cross examined and for further cross examination, the case was posted on 05.07.2017. However, on 05.07.2017, the learned counsel for the defendants reported no instructions. Therefore, the Trial Court had passed the Judgment and Decree under Order XVII Rule 2 CPC.

13. It is relevant to extract the provisions under Order 17 Rule 2 of CPC as follows:-

*“(2) **Costs of adjournment.**—In every such case the Court shall fix a day for the further hearing of the suit, and [shall make such orders as to costs occasioned by the adjournment or such higher costs as the court deems fit:] [Provided that,—*

(a) when the hearing of the suit has commenced, it shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds that, for the exceptional reasons to be recorded by it, the adjournment of the hearing beyond the following day is necessary.

(b) no adjournment shall be granted at the request of



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a party, except where the circumstances are beyond the control of that party,

(c) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment,

(d) where the illness of a pleader or his inability to conduct the case for any reason, other than his being engaged in another Court, is put forward as a ground for adjournment, the Court shall not grant the adjournment unless it is satisfied that the party applying for adjournment could not have engaged another pleader in time,

(e) where a witness is present in Court but a party or his pleader is not present or the party or his pleader, though present in Court, is not ready to examine or cross-examine the witness, the Court may, if it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be, by the party or his pleader not present or not ready as aforesaid.]”

14. Thus, it is clear that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Trial Court may proceed to pass order.

15. In the case on hand, P.W.1 was in the box for continuation of her cross examination. On that date, the learned counsel who was engaged by the defendants reported before the Trial Court that “no instructions from the defendants”. Therefore, the presence of defendants were not required before the Trial Court, when the suit was posted for



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continuation of evidence of P.W.1. Therefore, the Trial Court ought to not to have passed a Judgment under Order XVII Rule 2 CPC. Further, the Trial Court did not even send any notice to the defendants, when their counsel reported “no instructions” that too after part cross examination of P.W.1. On these grounds alone, the Judgment and Decree are not sustainable and are liable to be set aside. Further, this Court does not want to discuss any grounds raised by the defendants on merits.

16. Accordingly, Judgment and Decree dated 18.07.2017 in OS.No.175 of 2012 passed by the Principal District Judge, Chengalpattu, Kancheepuram district, are hereby set aside. The suit is remanded to the Trial Court for fresh disposal. The Trial Court is directed to give an opportunity to both the parties and dispose of the suit, on merits and in accordance with law, within a period of three months from the date of receipt of a copy of this Judgment.

17. In the result, this Appeal Suit is allowed. Consequently,



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connected Miscellaneous petitions are closed. No costs.

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Internet: Yes

Index : Yes/No

Speaking/Non Speaking order

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To

The Principal District Judge, Chengalpattu, Kancheepuram district.

G.K.ILANTHIRAIYAN. J.



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