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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **25.04.2023**

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S(MD)No.96 of 2023
and
C.M.P(MD)No.5743 of 2023

N.Karthik :Appellant/Third party

.vs.

1.Jain Natarajan :Respondent/Plaintiff

2.M.Natarajan Mudaliar

3.N.Sindhuja :Respondents/Defendants

PRAYER: Appeal Suit filed under Section 146 r/w 96 of the Civil Procedure Code against the decree and judgment made in O.S.No. 62 of 2015, dated 28.6.2022 on the file of the Additional District and Sessions Judge(Fast Track Court), Nagercoil, Kanyakumari District.

For Appellant :Mr.M.Jahangir Basha

For Respondent-1 :Mr.M.P.Senthil

For Respondent-3 :Mr.B.Thangamani



JUDGMENT

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The appeal suit has been filed challenging the judgment of the trial Court granting a decree for declaration and for recovery of possession by the consent of the defendants, as a third party.

2.It is relevant to note that the appellant's mother was a party to the suit. There was no challenge to the decree and judgment by the mother of the appellant. However, her son has filed this appeal challenging the decree and judgment and according to him, his rights have been affected.

3.The parties are referred to herin as per their own ranking before the trial Court.

4.The brief facts leading to the filing of this appeal suit is as follows:

The suit has been filed by the plaintiff, being the wife of the first defendant, claiming that though the suit property originally purchased in the name of her husband, the entire sale consideration has been paid by her, while she was working in America on 14.03.2013 and after her return from America, her husband has executed a settlement deed on 18.11.2011. By virtue



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of the said Settlement Deed, she become the absolute owner of the suit property. The second defendant has developed some illicit intimacy with the first defendant and has filed certain matrimonial proceedings before the Family Court at Chennai in H.M.O.P.No. 1860 of 2000. However, the said O.P was dismissed on the basis of an affidavit of compromise entered between the first and second defendants, wherein, she has clearly admitted that she has no marital relationship with the first defendant. After coming to know about the purchase of the property and the settlement deed executed in favour of the plaintiff by the first defendant, the second defendant and her children barged into the suit property and illegally occupied the suit property and she has gone to the extent of filing an application under the Domestic Violence Act claiming right of residence and the same has been dismissed by the Court below. Therefore, the plaintiff has filed the suit for declaration and for recovery of possession of the suit property.

5.The first defendant husband of the plaintiff admitted the purchase of the suit property from the income of the plaintiff and has also admitted the execution of the Settlement Deed in favour of the plaintiff and also disputed the marriage between the first and second defendant, wherein, he has also supported the case of



the plaintiff.

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6.The second defendant took a stand in the written statement that the suit property has been purchased from and out of the income of the first defendant/her husband and the alleged settlement deed executed in favour of the plaintiff was sham and nominal and the plaintiff has endorsed that the first defendant executed a settlement deed in her favour. The Written statement of the first defendant also not reflected the true facts. According to her, in family arrangement, the suit properties have been given to the second defendant and her children by the first defendant and according to her, she had married the first defendant on 23.12.1990 at Kancheepuram and she is also claiming right over the property of the first defendant. Hence she disputed the title of the plaintiff and further, it is the contention that they are in possession of the suit property for more than 15 years. It is the further stand of the second defendant that the suit is bad for non-joinder of necessary parties namely, her sons, who is residing with her.

7.Based on the above pleadings, the trial Court has framed eight issues originally and later, the trial Court has deleted the



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issue No.1 and 2 and issues decided by the trial Court is issue No.3 to 8, which reads as follows:

1.Whether the second defendant is the second wife of th first defendant?

2.Whether the alleged marriage of the first defendant and the second defendant is legally valid in the eye of law?

3.Whether the suit property was purchased by the first defendant as an ostensible owner for the plaintiff?

4.Whether the second defendant has any right of residence or any other allied right in the suit property?

5.Whether the plaintiff is entitled for the relief of declaration and consequential of recovery of possession from the second defendant?

6.Whether the plaintiff is entitled for the relief of injunction as prayed for?

7.Whether the plaintiff is entitled for the relief of mesne



profits as prayed for?

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8.To what other relief, the parties are entitled to?

8.On the side of the plaintiff, she examined herself as P.W.1 and Ex.P1 to Ex.P15 were marked and Ex.C1 to Ex.C4 were marked. On the side of the defendants, the first defendant examined himself as D.W.1 and four documents were marked. The second defendant remained ex-parte before the Trial Court, having filed a written statement.

9.Based on the above evidence and materials, the trial Court has decreed the suit in favour of the plaintiff. Challenging the said decree and judgment, neither the first defendant nor the second defendant filed any appeal. The present appeal has been filed by the son of the second defendant, with the leave of the Court.

10.The learned counsel for the appellant would challenge the decree and judgment of the trial Court mainly on the following grounds:

1.that the suit is bad for non-joinder of necessary parties and according to him, on the date of filing the suit, the appellant is



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residing with his mother in the suit property and therefore, the suit is liable to be dismissed for non-joinder of necessary parties.

2.the so-called Settlement deed has not been proved in the manner known to law and the original of the settlement deed has not been produced before the Court below and no attesting witness was examined to prove the settlement deed.

3.Further, the contention of the appellant is that the plaintiff has not proved the good faith of transaction, since she was in active confidence at the time of obtaining the document.

11.The learned counsel for the appellant relied on the judgment of the Honourable Apex Court in the case of ***Krishna Mohal Kul @ Nani Charan Kul and another .vs. Pratima Maity and others reported in (2004) 9 Supreme Court Cases 468.***

12.The learned counsel for the the first defendant would submit that the plaintiff was working in America and she has transferred huge amount in the name of her husband, the first defendant herein and the same was established under Ex.B1. Only



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after withdrawal of the said amount from the Bank, the suit properties were purchased in his name. Further, when she returned from America, the property has been gifted to the plaintiff by the first defendant. According to him, de-horse the consideration for the purchase of the property, once the settlement is executed in favour of the plaintiff, the plaintiff is the absolute owner of the suit property. Therefore she is entitled to seek for the relief of declaration and for recovery of possession. Further contention is that the present appellant is none other than the son of the first defendant and therefore, the question of making him as a party to the suit, does not arise at all.

13.The second defendant having taken a stand in the written statement to the effect that the possession of the property has been given legally, she has never contested the suit and she remained ex-parte before the trial Court. The present appellant has no right to file an appeal challenging the decree and judgment passed in a suit filed by the plaintiff and the defendants. It is the further contention that proving good faith of transaction does not arise at all when the first defendant himself has admitted the execution of the settlement deed in favour of the plaintiff. Therefore the question of proving the settlement deed and



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examination of the attesting witness to prove the same, does not arise at all. It is contention that Ex A11 filed before the trial Court clearly show that the second defendant herself had admitted before the Family Court, Chennai, that she is not the wife of the first defendant and there was no marital relationship between them. Such being the position, claiming right over the suit property is without any basis and the same cannot be countenanced.

14. In the light of the above facts, now the point that arose for consideration in this appeal suit is as follows:

1. Whether the appellant is having any vested right to file the present appeal suit as against the judgment and decree passed against his mother, particularly, when she was alive?

2. Whether the plaintiff is the absolute owner of the suit property by virtue of the Settlement Deed, dated 18.11.2011?

3. Whether the Settlement Deed suffers on the ground of fiduciary relationship between the parties?



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4.To what other relief, the appellant is entitled to?

15.The suit itself is filed for declaration and for recovery of possession. It is not disputed that the suit property was originally purchased in the name of the first defendant, who is the husband of the plaintiff. The position of the parties that the plaintiff is the wife of the first defendant is not disputed. The second defendant claims to have married the first defendant in the year 1990. However, to establish the same, no evidence whatsoever was filed before the trial Court. Be that as it may, Ex.A11 makes it clear that she has already filed H.M.O.P before the Family Court, Chennai in the year 2000 for restitution of conjugal rights, however, the said H.M.O.P.No.1860 of 2000 was dismissed. Ex.A11 is the joint compromise memo,wherein, it is clearly admitted that there is no marriage between the first defendant and herself. Similarly, she has also stated that she has no claim for permanent alimony and she has not claimed any maintenance or any other amount from the first defendant. This document has been filed by the plaintiff. Be that as it may, to show that there was a valid marriage between the first and second defendants, there was no evidence available on record. Further, even assuming that there was a marriage as contended by the second defendant, the fact remains



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that such marriage is null and void which is contracted during the subsistence of the first marriage with the plaintiff. Therefore the contention of the second defendant that she was the legally wedded wife of the first defendant, has not been established in the manner known to law. Further to show that the suit property was given to them by the first defendant and they have been in the suit property for more than 15 years and no document whatsoever was filed to prove the same. Even in the written statement filed by the second defendant, she has not disputed the revenue records standing in the name of the plaintiff. The only contention of the second defendant thereon in the written statement is that the suit property was purchased by the first defendant out of his own income and not by the income of the plaintiff. Even if such a stand is taken as true and proved, that will not tilt the position any more, for the simple reason that the suit property was purchased from the own income of the first defendant and it is the self-acquired property of the first defendant and he had dealt with the property in his own way by executing a Settlement Deed in favour of the plaintiff. Therefore once the Settlement Deed is executed and registered in the manner known to law, the plaintiff become the absolute owner of the suit property.



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16.The contention of the learned counsel for the appellant before this Court that the settlement deed has not been established by examining the attesting witness .This Court is of the view that there is no need to examine the attesting witness, once the execution of the document in favour of the plaintiff is not disputed in the written statement. Therefore, the execution of the document is admitted by the parties to the suit, the requirement of examining the attesting witness does not arise at all, as per the proviso to Section 68 of the Indian Evidence Act. Further, when the executant himself has admitted the very execution of the document namely, the Settlement Deed, it is sufficient to prove the execution as against whom the document is executed, as per Section 70 of the Indian Evidence Act. The first defendant has admitted the execution of the Settlement Deed in favour of the plaintiff. Therefore the question of examining the attesting witness to prove the document does not arise at all in this case. The document has been properly proved as required under law.

17.Yet another submission made by the learned counsel for the appellant is that the original of the Settlement has not been produced before the Court of Law. Admittedly, only secondary evidence has been filed by the plaintiff when the document itself



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has been admitted by the executant and has not been objected to by the other side and when the certified copy has been filed and hence, mere non-production of the original settlement deed will not affect the case of the plaintiff.

18.Yet another submission made by the learned counsel for the appellant is that the plaintiff has not pleaded and proved the good faith of transaction. It is relevant to note that the question of proving the good faith arise only when there is a question as to the good faith of transaction between the parties arise in the suit. Then the burden always lie on the person in whose favour the document executed. Only when the beneficiary of the document was in active confidence and exercising apparent control over the executant, the question of good faith will arise. Such situation is not even available in this case, wherein, the executant himself had admitted the document executed in favour of the plaintiff. Therefore the question of proving good faith of transaction does not arise at all. It is relevant to note that normally the husband, who is having love and affection and fiduciary relationship with wife,therefore the question of proving good faith does not arise at all.



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19.As far as the relationship between the plaintiff and first defendant, as husband and wife, is in existence. The second defendant has no legal status and her marriage was not established. She herself had admitted in Ex.A11 that there was no marriage between herself and the first defendant. Such being the position, she should be construed only as a stranger to the first defendant's family and she cannot challenge the document executed between the spouses ie, the first defendant and the plaintiff. At any rate, the question of proving good faith in the transaction does not arise at all in this case.

20.Yet another submission of the learned counsel for the appellant is that the suit is bad for non-joinder of necessary parties particularly, the appellant and his brother. It is relevant to note that absolutely there is no pleading whatsoever in the written statement to the effect that when they came into possession of the suit property, who allowed their possession and whether they have been given the possession of the suit property by the first defendant and from which year they are in possession. There is no iota of details whatsoever pleaded in the written statement, except contending that the suit property has been delivered in their favour in an family arrangement and no materials whatsoever has been



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produced to prove the same. Further it is relevant to note that the second defendant claims to be residing with her two sons in the suit property. It is relevant to note that merely because sons who are residing with their parents, mother or father, not made as a party in the suit, it cannot be taken advantage of by the sons when their parents are already made as parties to the suit. The very relief itself is sought against the defendants, their agents or relatives and persons claiming under her. When the sons or children are residing with parents, who are claiming right under the parents, this Court is of the view that such persons cannot be construed as a necessary party to the suit in whose absence no effective judgement could be delivered by the Court. Therefore, this Court is of the view that the children who are living with the father or mother and such parents set up a defense in the property and children are claiming right under the parents, cannot claim any independent right, contending that they are the necessary parties or proper parties to the lis. Such being the position, the contention of the learned counsel for the appellant that the suit is bad for non-joinder of necessary parties, cannot be countenanced in law.

21.The learned counsel for the appellant relied upon the





Index:Yes/No
Internet:Yes/No
NCC:Yes/No
vsn

To

- 1.The Additional District and Sessions Judge,
Fast Track Court,
Nagercoil,
Kanyakumari District.
- 2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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N.SATHISH KUMAR.,J.

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