



S.A.No.779 of 1993

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 14.02.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A.No.779 of 1993

and

C.M.P(MD) No.3084 of 2020

1.Subramanian (died)

2.Madasamy Nadar

3.Palaathal

4.Madasamy

5.Muruganatham

6.Madathiyammal

7.Kamaraj

8.Ramalakshmi

...Appellants

(Appellants 3 to 8 are brought on record as LR's of the deceased first appellant vide Court order dated 19.09.2017 in M.P(MD) Nos.1 to 3 of 2013)

-Vs-

1.Amaravathi Ammal (died)

2.P.B.Sivabakkiam Nadar



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- 3.Chettiyappa Nadar
- 4.Lakshmanaperumal Raja
- 5.Sheik Mohideen Maraikkayar
- 6.Abdul Kareem Marayakkayar
- 7.Vasudeva Neallur Panchayat Union,
Rep. by its Block Development Officer,
Vasudevanallur, Sivagiri Taluk.
- 8.Venniamalayammal
- 9.Samiya Devar
- 10.Shanmughathai
- 11.R.Subramaniam
- 12.Sendurpandi
- 13.R.Karuthapandi
- 14.Ganapathiyammal
- 15.Madathiyammal
- 16.Kaliyammal
- 17.Samudragani
- 18.Subbianaan
- 19.Madasamy



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20.Pechiyammal

21.Annamalai

22.Guru @ Guruswamy

23.R.Thangasamy (died)

24.T.Ramaswamy @ Raja

25.Indira

26.Rajammal @ Anitha

(Respondents 23 to 26 are brought on record as legal representatives of the deceased first respondent vide Court order dated 01.08.2008 made in C.M.P.Nos. 14164 and 14165 of 1999)

27.R.T.Arasu

28.T.Tamilarasan

29.T.Gandhi

30.T.Kalaiyarasu

... Respondents/Respondents/

(Respondents 27 to 30 are brought on records as legal representatives of the deceased 23rd respondent vide Court order dated 03.01.2020 made in M.P(MD)No.1 to 3 of 2015)

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the decree and judgment of the learned Additional District



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Judge, Tirunelveli, dated 11.03.1993 in A.S.No.24 of 1989 in confirming the judgment and decree dated 16.03.1989 in O.S.No.83 of 1979 on the file of the Subordinate Court, Tenkasi.

For Appellants : Ms.Janakidevi
for Mr.S.Siva Thilakar

For R14, 15 & 24 : Mr.A.R.M.Ramesh

For R25 & R26 : Mr. R.Meenakumari

For R27 to R30 : Mr.M.Rajasekaran

For R5 & R11 : No appearance

R1 & R23 : Died

R12 : Dismissed

R2 to R4, R6 to R10

R13, R16 to R20 : Notice dispensed with

JUDGMENT

The plaintiffs 3 and 4 in a suit for partition are the appellants 1 and 2. The suit was decreed by the trial Court granting preliminary decree for partition in respect of the properties not covered by Ex.B8. The suit was dismissed in respect properties covered under Ex.B8. Aggrieved by the same, the plaintiffs filed an appeal in A.S.No.24 of 1998 on the file of District Court, Tirunelveli and



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the first appellate Court affirmed the finding of the trial Court. Aggrieved by the same, the plaintiffs are before this Court.

2. According to the appellants 1 and 2/plaintiffs, originally the suit was filed by maternal grand-mother and mother of the appellants herein, namely, Valliammal and Mookkayee Ammal. While the suit was pending, the said Valliammal and Mookkayee Ammal passed away and the appellants herein were recorded as legal representatives of the deceased plaintiffs and brought on record as plaintiffs 3 and 4. According to the plaintiffs, the suit properties are the ancestral properties belonging to a Hindu Joint family consisting of the deceased first plaintiff's, husband and father of the deceased second plaintiff, namely Urkalaperumal @ Urkalapothi Nadar and his son Subbaiah Nadar, who was arrayed as first defendant in the suit. It was also averred in the plaint that the said Urkalaperumal died in the year 1977 leaving behind his wife, only son and two daughters, namely, deceased first plaintiff, first defendant, second plaintiff and second defendant. After the death of Urkalaperumal, as per Hindu Law that stood at that point of time, the deceased first and second plaintiffs are entitled to 1/8th share each. It was further averred that the first respondent/second defendant



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herein claimed to have obtained gift of some of the items of the suit properties from Urkalaperumal and his son, first defendant namely, Subbiah Nadar. It was specifically averred by the plaintiffs that those documents were sham and nominal documents and hence, not valid in the eye of law. Pending suit, the first defendant in the suit, namely, only son of Urkalaperumal also died issueless. Therefore, 5/8th share owned by the deceased first defendant devolved on his sister, namely, deceased second plaintiff and the first respondent / second defendant. Hence, the appellants sought for partition of their 9/16th share in the suit schedule property.

3. The deceased first defendant, namely only son of Urkalaperumal filed a written statement, wherein he raised a plea that the documents obtained from his father and himself were all sham and nominal documents and no rights thereunder had been passed to the first respondent herein.

4. The contesting first respondent herein filed a written statement and claimed that Urkalaperumal Nadar and his son, namely, the deceased first defendant voluntarily executed a settlement deed dated 08.05.1968 in her favour,



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settling some of the items of the suit properties and hence, the first respondent/second defendant is exclusively entitled to the items covered under Ex.B8. It is further pleaded in the written statement of the 1st respondent that in respect of the items covered under Ex.B8, mutation of revenue records had taken place in her favour and she had been in undisputed possession and enjoyment of those properties. It was further pleaded that portion of items-7 to 12, 15 and 20 were sold to the third parties. Therefore, the settlement deed executed by Urkalaperumal Nadar and his son Subbaiah Nadar came into force and consequently, the suit for partition in respect of the items covered under Ex.B8 was not maintainable.

5. Before the trial Court, the second appellant herein was examined as P.W.1 and his father-in-law was examined as P.W.2. The appellants marked as many as 16 documents as Ex.A1 to A16. On behalf of the respondents, the first respondent Amaravathi was examined as D.W.1 and her husband was examined as D.W.2. One of the attestors to Ex.B8-settlement deed was examined as D.W.3. The sixth respondent herein one of the alienees of the portion of the suit property was examined as D.W.4. On behalf of the respondents, 34 documents were



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marked as Ex.B1 to B34.

6. On appreciation of oral and documentary evidences available on record, the trial Court upheld the validity of Ex.B8-settlement deed pleaded by the first respondent and consequently, dismissed the suit in respect of the items covered under Ex.B8. The trial Court granted a preliminary decree for partition in respect of other items. Aggrieved by the judgment and decree, the appellants herein filed an appeal in A.S.No.24 of 1989 on the file of Additional District Court, Tirunelveli, challenging the portion of the decree dismissing the suit in respect of the items covered under Ex.B8. A cross objection was filed by the first respondent challenging the adverse findings of the trial Court holding that the settlement deed executed by the deceased first defendant in favour of the first respondent/second defendant was not valid. The first appellate Court concurred with the findings of the trial Court and dismissed the appeal as well as cross objection. Aggrieved by the same, the plaintiffs/appellants 1 to 2 have come up by way of this second appeal. As far as the dismissal of the cross objection is concerned, the first respondent has not preferred any cross objection in this second appeal.



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7. This Court at time of admitting the second appeal formulated the following substantial questions of law:-

“1. Whether the Courts below are right in holding that the burden of proof was only with the plaintiffs, notwithstanding the denial of the validity of the documents by one of the executors and the surviving attesting witnesses?

2. Whether the Courts below are justified in holding that the gift deed Ex.B8 was valid?

3. Whether the gift deed executed by the members of joint family is binding the other members of joint family without the knowledge and consent whether Ex.B8 had been proved as per Section 122 of Transfer of Property Act? ”

8. The learned counsel for the appellants submitted that Ex.B8- settlement deed relied on by the respondents was not at all proved in terms of Section 68 of the Indian Evidence Act. The learned counsel by taking this Court to the evidence of D.W.3 attester to the document, submitted that the evidence of D.W.3 is not useful to prove the execution of the settlement deed-Ex.B8. The



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learned counsel further submitted that when the attesor called by propounder of the document, failed to support the execution, the first respondent ought to have proved the due execution of disputed settlement deed by means of other evidence as required under Section 71 of the Indian Evidence Act and in the case on hand, the first respondent failed to lead any other evidence to prove the execution of Ex.B8. Therefore, it is the contention of the learned counsel for the appellants that the findings rendered by the Courts below that Ex.B8 is vitiated by perversity.

9. The learned counsel appearing for the contesting respondents submitted that even in the pleadings, the appellants had not specifically disputed the execution of Ex.B8-settlement deed and therefore, this is a case governed by proviso to Section 68 of Indian Evidence Act and consequently, it is not incumbent on the first respondent to call any one of the attestors to prove the settlement deed. The learned counsel further submitted that the appellants in their pleadings claimed that Ex.B8-settlement deed was a sham and nominal document, but however they have not chosen to lead any evidence to prove that Ex.B8-settlement deed is a sham and nominal document. On the contrary, the first



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respondent produced revenue documents and sale deed executed by her, namely, Ex.B9 to Ex.B19 to show that Ex.B8 had been acted upon.

10. The main question which has to be decided in the second appeal is with regard to the validity of Ex.B8-settlement deed projected by the first respondent.

11. The appellants even in their plaint averments referred to the deed relied on by the first respondent and contended that the gift deed allegedly executed by Urkalaperumal Nadar and his son, namely, the deceased first defendant was a sham and nominal document and hence, the same not valid in the eye of law. A perusal of the plaint averments would make it clear that the execution of Ex.B8-settlement deed relied on by first respondent was not specifically denied in the pleadings of the appellants. Section 68 of the Indian Evidence of Act would suggest mode of proof of execution of the document required by law to be attested. The said provision reads as follows:-

“68.Proof of execution of document required by law



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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 purports to have been executed is specifically denied.”

12. A perusal of above provision would make it clear that compulsory examination of attesor is necessary in case of Will. In case of all other registered documents, examination of attesor is necessary only if the execution of the registered document, is denied by other party. In the case on hand, a perusal of the plaint averments would make it clear that the execution of Ex.B8, registered settlement deed, was not at all denied by appellants specifically. They simply raised a plea that the document was sham and nominal, which only means that



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they impliedly admitted the execution of the document. In order to prove the plea that Ex.B8 is a sham and nominal document, the appellants have not chosen to lead any acceptable evidence. On the other hand, the first respondent filed revenue documents and tax receipts to show that subsequent to execution of Ex.B8, patta for the properties covered under the document was changed to the name of the first respondent and she also paid tax for the said properties.

13. The first respondent also filed Ex.B3, Ex.B14, Ex.B15, Ex.B23, Ex.B24 and Ex.B29 to show that some of the properties covered under Ex.B8 were alienated by her in favour of third party. Therefore, the first respondent had let in positive evidence to show that Ex.B8- settlement deed in her favour was acted upon. Therefore, both the Courts below rightly came to the conclusion on the basis of evidence available on record that Ex.B8 is a valid document and the plea raised by the appellants that it was a sham and nominal document was not at all proved. Ex.B8, settlement deed was executed by then coparcenors of the family, namely Urkalaperumal and his son Subbiah. Hence, it is binding on other non co-parcenors. The plaintiff, who claim right under Urkalaperumal cannot question settlement executed by him during his life time. The deceased plaintiff



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were not coparcenors on the date of Ex.B8. Therefore, I do not find any reason to interfere with the findings of facts arrived at by the Courts below that Ex.B8 is a valid document and it had been acted upon by the first respondent.

14. In view of the discussion made earlier, the substantial questions of law framed at the time of admission are answered against the appellants and in favour of the respondents.

15. In fine,

- (i) The Second Appeal is dismissed by confirming the judgments and decrees passed by the Courts below;
- (ii) in the facts and circumstances, there will be no order as to costs; and
- (iii) connected miscellaneous petition is closed.

14.02.2023

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

14/16



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To

- 1.The Additional District Judge,
Tirunelveli.
2. The Subordinate Court, Tenkasi.
- 3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

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