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S.A. No.57 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.02.2024

DELIVERED ON : 23.02.2024

CORAM:

THE HON'BLE MR. JUSTICE P.B. BALAJI

S.A. No.57 of 2018

Mani Appellant

Versus

Kalpana ... Respondent

Second Appeal filed under Section 100 of the Civil Procedure code, against the decree and judgment passed in A.S. No.70 of 2014 dated 31.08.2016 on the file of I Additional District and Sessions Court, Coimbatore, confirming the judgment and decree dated 10.03.2014 in O.S.No.619 of 2011 on the file of Principal Sub Court, Coimbatore.

For Appellant : Mr.V.K.Vijaya Ragavan

For Respondent : Mr.K.Thilageswaran

JUDGMENT

This Second Appeal is filed challenging the concurrent findings of the Courts below.



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2. The unsuccessful plaintiff, in a suit for declaration that he was the absolute owner of the property under a registered Settlement Deed dated 14.09.2010 and for a direction to the defendant to hand over vacant possession of the suit property, is the appellant in the Second Appeal. The parties are described as per their litigative status in the suit.

3. The material facts that are necessary for deciding the above Second Appeal are as follows:-

The plaintiff is the brother of the defendant's husband. The suit property originally belonged to the husband of the defendant viz., Jegatheesan, who is none else that the elder brother of the plaintiff. He had purchased the property under a registered Sale Deed dated 30.03.1992. The plaintiff's brother viz., Jegatheesan and the defendant were married in the year 1993 and they were also blessed with a son by name Srivatsa, who was 16 years at the time of institution of the suit. However, even as early as in the year 1995, the defendant started living separately from her husband and was staying with her parents at Coimbatore. It is the case of the plaintiff that the defendant was living in a suit property measuring 452 sq.ft., comprising of a



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living room, kitchen, bed room, toilet and bathroom. The suit property was settled by the plaintiff's brother Jegatheesan in favour of the plaintiff on 14.09.2010. According to the plaintiff, the settlement deed was acted upon and the plaintiff mutated the revenue records in his name.

4. In the meantime, the defendant filed several criminal complaints against the plaintiff's brother as well as his family members, with a view to harass them. Subsequent to the settlement deed, being executed in favour of the plaintiff, the plaintiff requested the defendant to hand over vacant possession of the suit property. However, the defendant, without any right over the suit property, denied the plaintiff's title. It is the specific case of the plaintiff that the defendant was granted permission only to reside in the suit property and the plaintiff, being the lawful owner, was entitled for recovery of possession. As the defendant had denied the plaintiff's title, the plaintiff sought for the relief of declaration of his title to the suit property.

5. The defendant has filed a written statement, denying the claims made by the plaintiff. According to the defendant, she had initiated proceedings before the criminal court besides defending the divorce case filed



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by her husband before the Family Court. The defendant spent Rs.1,00,000/- for construction of first floor building in the suit property. The son of the defendant was a minor and the defendant, being unable to maintain the minor son as well as herself, sought for maintenance as well as right of residence under the provisions of Protection of Women from Domestic Violence Act , 2005.

6. The specific case of the defendant was that only in order to defeat the defendant's right, her husband executed a settlement deed in favour of the plaintiff and the settlement deed was hit by Section 39 of The Transfer of Property Act, 1882.

7. Before the trial Court, 4 documents were marked as Ex.A.1 to A.4 on the side of the plaintiff and Exs.B.1 to B.4 were marked on the side of the defendant. The plaintiff/Mani himself was examined as P.W.1 and one Thirunavukarasu was examined as P.W.2. On the side of the defendant, the defendant/Kalpana herself was examined as D.W.1.



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8. The trial Court, after framing issues and after giving due consideration to the evidence available on record, dismissed the suit holding that the defendant was residing in the suit property after her marriage and she had also claimed her right of residence as well as maintenance and finding that the proceedings are pending before the Family Court, Coimbatore and also Family Court at Trichy. The trial Court proceeded to hold that the settlement deed was not binding on the defendant. Further, the trial Court also found that the settlement deed was not accepted and acted upon since the plaintiff's brother continued to receive rents from the suit property, though the same was settled in favour of the plaintiff. The trial Court accepted the contention of the defendant that the settlement deed was hit by Section 39 of the Transfer of Property Act, 1882 and dismissed the suit.

9. Aggrieved by the judgment and decree of the trial Court, the plaintiff preferred an appeal in A.S.No.70 of 2014 before the I Additional District and Sessions Court, Coimbatore. The first appellate Court held that the settlement deed came to be executed after disputes arose between the defendant and the plaintiff's brother and the settlement deed was only to escape the liability of paying maintenance and was not a genuine transaction. The first appellate



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Court also held that the wife had a statutory right to reside in the matrimonial home, where she lastly resided with her husband and therefore, the plaintiff is not entitled to seek recovery of possession from the defendant. The appeal was therefore dismissed, confirming the judgment and decree of the trial Court. Aggrieved by the concurrent findings rendered by the Courts below, the plaintiff has preferred the above Second Appeal.

10. Though the Second Appeal is filed in the year 2018, the same is yet to be admitted.

11. I have heard Mr.V.K.Vijayaragavan, learned counsel for the appellant and Mr.K.Thilageswaran, learned counsel for the respondent. On hearing the counsel on either side, I frame the following substantial questions of law to be answered/decided in the above Second Appeal:-

- i) Whether Ex.A.2 Settlement Deed is void and hit by Section 39 of The Transfer of Property Act, 1882?
- ii) Whether the Courts below erred in holding that the Settlement Deed was not proved in accordance with



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law when execution of the Settlement Deed was not disputed by the defendant?

iii) Whether the Courts below erred in holding that the Settlement Deed was neither accepted nor acted upon by the plaintiff?

12. Mr.V.K.Vijayaragavan, learned counsel for the appellant would attack the findings of the trial Court primarily on the ground that pending the suit, the Family Court granted a decree of dissolution of marriage in HMOP No.84 of 2012 dated 25.01.2017. It is relevant to note that the said HMOP was decided along with I.A.No.434 of 2016, where the defendant herein sought for permanent alimony to the tune of Rs.60,00,000/- and in the alternate Rs.30,000/- per month as maintenance to be paid to her by the plaintiff's brother.

13. The Family Court, Coimbatore, in and by common order dated 25.01.2017, granted divorce and also allowed the application in I.A.No.434 of 2016 directing the defendant's husband/Jegadeesan to pay a sum of Rs.5,00,000/- towards permanent alimony to the defendant.



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14. It is seen that the defendant's husband preferred Civil Miscellaneous Appeal before this Court in CMA No.3335 of 2017 and the Hon'ble Division Bench of this Court, in and by judgment dated 02.03.2018, dismissed the Civil Miscellaneous Appeal. A copy of the said judgment has also been produced by the learned counsel for the appellant by way of an additional typed set of papers.

15. On perusal of the said judgment, it is seen that the Civil Miscellaneous Appeal was filed by the husband of the defendant challenging the permanent alimony of Rs.5,00,000/- ordered by the Family Court. There is no appeal filed against the grant of divorce and the same has attained finality. The defendant's husband's attempt to modify the permanent alimony awarded was also unsuccessful and the same has become final.

16. The learned counsel for the appellant has also produced the judgment copy in DVA No.34 of 2010 on the file of Judicial Magistrate No.I, Coimbatore. In the said Domestic Violence proceedings, the defendant, along with her minor son, sought for one time maintenance of Rs.30,00,000/- and



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also Rs.5,00,000/- towards educational expenses of the minor son and Rs.20,00,000/-towards future educational expenses besides Rs.10,00,000/- towards mental agony. The Judicial Magistrate No.I, Coimbatore, in and by order dated 17.10.2018, dismissed the claim insofar as the defendant was concerned, however, with regard to the minor son, the Court had directed the defendant's husband to pay a sum of Rs.3,000/-per month for 36 months, totalling Rs.1,08,000/-. The counsel on either side submit that the said amount was paid.

17. Learned counsel for the appellant also brought to my notice that pending Second Appeal, on 11.01.2024, the permanent alimony amount of Rs.5,00,000/- was also deposited by the defendant's husband/Jegatheesan. In support of the said deposit, a copy of the Demand Draft, issued by Indian Overseas Bank, Gandhipuram branch dated 19.08.2023, bearing No.875184 and the receipt issued by the Sheristadar of Family Court, Coimbatore dated 11.01.2024 are produced. It is also found that the criminal case No.81 of 2013 before the Mahila Court, Coimbatore has been slapped not only against the defendant's husband but also against the plaintiff, for the offences punishable under Sections 498(A) and 506(i) IPC. The said criminal case



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also came to be dismissed on 23.11.2017. The learned counsel for the appellant finally placed reliance on the dictum of the Hon'ble Supreme Court in the case of *Asokan vs Lakshmikutty and Others* reported in (2007) 13 SCC 210 with regard to the conditions for a valid gift.

18. Per contra, Mr.K.Thilageswaran, learned counsel for the defendant/respondent would support the concurrent findings of the courts below and state that the defendant, having come to occupy the suit property, subsequent to her marriage, was entitled to her right of residence and further the defendant and her minor son could not go anywhere else and the defendant's brother was obligated to provide shelter to them. He would also state that the settlement deed was hit by Section 39 of the Transfer of Property Act, 1882 besides also, as rightly found by the first appellate court, the same not being duly acted upon as required under law in order to constitute a valid and complete gift/settlement. The learned counsel for the respondent/defendant has placed reliance on the following decisions:-

*i) Raj Talreja vs Kavita Talreja reported in AIR
2017 SC 2138*



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***(ii) Rajnesh vs Neha and Ors reported in AIR 2021
SC 569***

***(iii) Vaishali Abhimanyu Joshi vs Nanasaheb Gopal
Joshi reported in AIR 2017 SC 2926***

and

***(iv) Vandhana vs T.Srikanth and Krishnamachari
reported in 2007 (5) CTC 679***

19. I have carefully considered the submissions made by the learned counsel on either side.

20. The moot question to be decided in the Second Appeal revolves around the right of the defendant, who is none else than the wife of the plaintiff's brother, to maintenance/right of residence in the matrimonial home along with her son. Section 39 of The Transfer of Property Act, 1882 is usefully extracted herein:-

***“ 39. Transfer where third person is entitled to
maintenance***

*Where a third person has a right to receive
maintenance, or a provision for advancement or
marriage, from the profits of immovable property,*



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and such property is transferred, the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.”

21. Both the trial court as well as the first appellate Court have held that the defendant was entitled to receive maintenance from the plaintiff's brother and therefore, the plaintiff would be obligated despite the gratuitous settlement deed in his favour. As per Section 39 of The Transfer of Property Act, 1882, the defendant may enforce her right as against the plaintiff. Even on a plain reading of Section 39 of the Act, the Section does not prohibit a settlement deed being executed by the husband in favour of his brother. The Section also does not render such settlement deed void. What all it states is that the right of maintenance may be enforced even against the plaintiff's brother, who claims under the registered Settlement Deed from the defendant's husband.



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22. Keeping in mind the mandate of Section 39 of the Act and the ratio laid down by this Court in the case of *Vandhana vs T.Srikanth and Krishnamachari* reported in **2007 (5) CTC 679**, it can be easily inferred that only where the marriage subsisted between the parties, the wife would have a right to protect her possession of the suit property, being her matrimonial home. In fact, in the above said case, the matrimonial proceedings were pending and an injunction was sought for, to protect the wife's possession, on the ground that there was a domestic relationship and a shared house hold. However, in the present case, the decree for divorce has become final and therefore, the relationship of husband and wife stands severed and it is not open to the defendant to claim that she has a right of residence even in a shared house hold, irrespective of whether the house hold belonged to her husband or joint family of which, her husband was a member. Thus, this line of argument advanced by the learned counsel for the respondent/defendant is to be rejected.

23. However, considering the second limb of argument that in lieu of maintenance, the defendant has a right to reside in the suit property, as already seen, all the proceedings initiated by the defendant, including the



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maintenance proceedings as well as the domestic violence proceedings, came to be dismissed. It is not the case of the defendant that the maintenance directed to be paid to the minor son was defaulted by her husband. The only grievance of the defendant is that the permanent alimony amount ordered by the Family Court was not paid and therefore, she has a right to continue to reside in the suit property.

24. As already discussed herein above, pending the Second Appeal, the said sum of Rs.5,00,000/- (Rupees Five Lakhs only) was deposited and therefore, the liability of the plaintiff's brother viz., the defendant's husband stands fully discharged. The defendant is not therefore entitled to invoke Section 39 of the Transfer of Property Act, 1882 any longer and seek to enforce her right to receive maintenance which stands satisfied already.

25. With regard to the contention of the learned counsel for the respondent/defendant that the settlement deed was neither accepted nor acted upon, it is seen from the oral and documentary evidence that the settlement deed is a registered document. The plaintiff's brother has not reserved any right by way of right to alienation. The settlement deed also does not reserve



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right of cancellation of settlement deed on the plaintiff's brother. The plaintiff has also mutated the revenue records in his name. The only circumstance that is put against the plaintiff is that the plaintiff's brother is receiving the rents from the tenants in the remaining portions of the property. In my view, the fact that the plaintiff has permitted his brother to collect rents in the remaining portion of the property settled, excluding the portion under the occupation of the defendant, cannot be put against the plaintiff and in fact is alien for consideration in a matter of this nature. As held by the Hon'ble Supreme Court in the case of *Asokan vs Lakshmikutty and Others* reported in *(2007) 13 SCC 210*, though there is no particular mode of acceptance of gift under the Transfer of Property Act, once a gift is complete, the same cannot be rescinded or revoked and the Hon'ble Supreme Court further held that subsequent conduct of a donee cannot be a ground for rescission of a valid gift.

26. Applying the said ratio in the facts of the present case, merely because the plaintiff permitted his brother to receive the rents, the same would not invalidate the settlement deed. Further, in any event, even in terms of Section 39 of the Transfer of Property Act, 1882 the only available right to



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the defendant was to recover the permanent alimony amount of Rs.5,00,000/-

. The same was also deposited before the Court concerned, pending Second Appeal. Thus, the defendant cannot take shelter or umbrage under the provisions of the Transfer of Property Act, 1882 especially Section 39 of the Act to protect her possession.

27. Once the settlement is found to be valid and the defendant has absolutely no iota of right, title or interest in the said property, she is bound to vacate and hand over vacant possession to the plaintiff, who is the lawful and absolute owner of the property.

28. The learned counsel for the respondent/defendant relied upon the decision of the Hon'ble Supreme Court in the case of ***Raj Talreja vs Kavita Talreja*** reported in ***AIR 2017 SC 2138***, where, the Hon'ble Supreme Court observed that wife would have to have a decent house to live and therefore, some permanent arrangement was to be made for her alimony and residence.

29. On the facts of the case before the Hon'ble Supreme Court, it



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directed a sum of Rs.50,00,000/-(Rupees Fifty Lakhs only) as one time permanent alimony and also directed the husband to transfer of one flat of value upto Rs.1,00,00,000/-(Rupees one crore only) in favour of wife therein and till such time, the wife was permitted to live in the house, in which, she was residing viz., the matrimonial home.

30. The facts of the above case are on an entirely different footing and the said decision of the Hon'ble Supreme Court on a particular given set of facts and circumstances will not amount to *ratio decidendi* to be applied in the above case,

31. In the case of ***Rajnesh vs Neha and Ors*** reported in ***AIR 2021 SC 569***, the Hon'ble Supreme Court held that wife was entitled to claim maintenance under different statutes and there is no bar to seek maintenance under the Protection of Women from Domestic Violence Act, 2005, as well as Section 125 of Code of Criminal Procedure or under the Hindu Marriage Act, 1955. However, the Hon'ble Supreme Court clearly held that while deciding the quantum of maintenance, the subsequent proceedings, either the Civil Court or the Family Court, ought to take into account, the maintenance



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already awarded and accordingly, determine the maintenance payable to the wife.

32. There is no quarrel with regard to the said ratio. In fact, the same has absolutely no bearing to the facts of the present case since the claim under the provision of Protection of Women from Domestic Violence Act, 2005 was dismissed and what was granted to the defendant was only Rs.5,00,000/-, that too, towards permanent alimony. The defendant has not chosen to challenge the quantum awarded towards permanent alimony and the same has become final and therefore, I am unable to apply the ratio laid down in the above case to the present appeal.

33. Lastly, the learned counsel for the defendant/respondent has placed reliance on the decision of the Hon'ble Supreme Court in the case of *Vaishali Abhimanyu Joshi vs Nanasaheb Gopal Joshi* reported in *AIR 2017 SC 2926*, wherein, the Hon'ble Supreme Court, while discussing the provisions of the Protection of Women from Domestic Violence Act, 2005, held that pending matrimonial disputes between the husband and wife and in view of the object of Section 26 of Protection of Women from Domestic Violence



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Act, 2005, women are the victims of violence of any kind occurring within the family. However, the question before the Hon'ble Supreme Court was whether the counter claim filed by the wife seeking right under Section 19 of the Protection of Women from Domestic Violence Act, 2005 could be entertained in a suit filed against the wife under the provisions of Provincial Small Cause Courts Act, 1887. Therefore, the above judgment also does not help the defendant's case in any manner.

34. For all the above reasons, especially taking note of the subsequent event i.e., deposit of Rs.5,00,000/- (Rupees Five Lakhs only), being the permanent alimony, which was the only subsisting claim between the defendant and her husband, there being no other right or claim available to the defendant, the defendant is not entitled to any protection or enforcement of right under Section 39 of The Transfer of Property Act, 1882. The plaintiff, having become the sole and absolute owner of the property under the registered settlement deed, which is found to be valid, accepted and acted upon, as already discussed above, is entitled to the relief as prayed for. Thus, the substantial questions of law are answered in favour of the appellant.



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35. In the result, the judgment and decree of the courts below are set aside and the Second Appeal is allowed. The defendant is directed to vacate and hand over the vacant possession of the suit property within a period of six (6) months from the date of receipt of a copy of this judgment, subject to filing an affidavit of undertaking within ten (10) days from today, undertaking to vacate and hand over the vacant possession of the suit property to the plaintiff peacefully and without driving the plaintiff to execution proceedings. It is also made clear that if the affidavit of undertaking is not filed within 10 days from today, the appellant shall be entitled to execute the decree forthwith.

No costs.

23.02.2024

Index: Yes/No
Speaking Order/Non-Speaking Order
sr



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To

1. The Principal Sub Court, Coimbatore
2. I Additional District and Sessions Court, Coimbatore,
3. The V.R.Section, High Court, Chennai.



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P.B.BALAJI,J.

SR

Pre-Delivery Judgment
in S.A.No.57 of 2018

23.02.2024



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Pre-Delivery Judgment in S.A No.57 of 2018

To

The Hon'ble Mr.Justice **P.B.BALAJI**

Most respectfully submitted

S.Revathi

Prl.Pvt.Secy to Hon'ble Judges