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S.A. No.666 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.02.2024

DELIVERED ON :08.03.2024

CORAM:

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

S.A. No.666 of 2017
and CMP No.17248 of 2017

C.Sarojini

Versus

.... Appellant

1.M.Mallika (died)
2.K.Rajagopal
3.P.Nachimuthu
4.N.Poornachandran
5.Punnithavalli
(R.3 to R.5 brought on record as Legal
representatives of the deceased first
respondent M.Mallika vide court order
dated 12.11.2021 made in CMP No.
13469 of 2021)

... Respondents

Second Appeal filed under Section 100 of the Civil Procedure code, against the decree and judgment passed in A.S.No.8 of 2016 dated 24.04.2017 on the file of Subordinate Court, Pollachi, reversing the judgment and decree dated 25.04.2016 in O.S.No.96 of 2000 on the file of District Munsif Court, Pollachi.



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For Appellant

: Mr.K.V.Subramanian
Senior Counsel for
Mr.S.Chandrasekaran

For Respondents

: Mrs.R.Gowri

JUDGMENT

This Second Appeal is filed challenging the judgment and decree passed in A.S.No.8 of 2016 dated 24.04.2017 on the file of Subordinate Court, Pollachi, reversing the judgment and decree dated 25.04.2016 in O.S.No.96 of 2000 on the file of District Munsif Court, Pollachi.

2. The plaintiff, in a suit for declaration of title and with the further reliefs of cancellation of settlement deed in favour of the plaintiff's brother and cancellation of the sale deed, executed by the brother in favour of the third party purchaser, is the appellant herein. The parties are described as per their litigative status in the suit. The brief facts that are necessary for adjudicating the present Second Appeal are as hereunder:-

3. The plaintiff is the daughter of the second defendant. It is the case of the plaintiff that her mother executed a settlement deed in her favour on



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03.01.1990 and same was also duly registered and in terms of the settlement deed, the plaintiff has become the absolute owner and she was in possession and enjoyment of the suit property. It is her specific case that the third defendant, her brother, signed as a witness to the said settlement deed and therefore, he is fully aware of the said settlement.

4. According to the plaintiff, the settlement deed is irrevocable and possession of the property was also delivered by the second defendant to the plaintiff on the date of the settlement deed. However, without any right to revoke the settlement deed, the second defendant, behind the back of the plaintiff, cancelled the settlement deed on 03.10.1996. On the very same day, she executed a fresh settlement deed in favour of her brother/third defendant.

5. Subsequently, the third defendant has sold the suit property in favour of the first defendant under a registered sale deed dated 06.10.1997. In this backdrop, the plaintiff instituted the suit for the relief of declaration which has been set out herein above.



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6. The first defendant/purchaser filed a written statement, stating that the suit was barred by limitation; the settlement deed was never acted upon; the plaintiff was never put in possession pursuant to the settlement deed and therefore, there was no valid gift as contemplated under the provisions of the Transfer of Property Act, 1882 . Further, the first defendant, having purchased the suit property from the third defendant, is a bonafide purchaser and she has been in possession and enjoyment of the suit property ever since from the date of her purchase.

7. Pending the suit, the plaintiff amended the plaint and sought for recovery of possession from the first defendant. Though the said application for amendment was resisted by the first defendant, the application was allowed and this Court, in revision proceedings, while confirming the amendment, reserved the right of the first defendant to raise all the contentions available in law, in the suit. Thereafter, the first defendant has also filed an additional written statement.



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8. The trial Court decreed the suit on the ground that the settlement deed was irrevocable and therefore, the settlement deed executed by the mother/second defendant was not binding on the plaintiff and consequently, the settlement deed in favour of the third defendant and the sale deed in favour of the first defendant were set aside.

9. On appeal by the first defendant, the first appellate Court has reversed the findings of the trial Court and held that the settlement deed was not acted upon and therefore, the plaintiff could not claim any right or title under the settlement deed dated 03.01.1990 and therefore, the first appellate Court upheld the cancellation of settlement deed and also upheld the sale deed in favour of the first defendant. Aggrieved by the reversal findings, rendered by the first appellate Court, the plaintiff has filed the present Second Appeal.

10. On 02.11.2017, the Second Appeal was admitted on the following substantial questions of law:-



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i) Whether the judgment and decree of the lower appellate Court is sustainable in law when the plaintiff has proved the valid execution of the Registered Settlement Deed dated 03.10.1996 (Ex.A.1)?

ii) Whether the judgment and decree of the lower appellate Court is sustainable in law when the 2nd defendant has no authority or any right to execute any document as cancellation deed dated 13.10.1996 with the 2nd defendant to cancel the Settlement Deed Ex.A.3?

11. I have heard Mr.K.V.Subramanian, learned Senior counsel for Mr.S.Chandrasekaran, counsel for the appellant and Mrs.R.Gowri, learned counsel for the contesting respondent viz., the purchaser/first defendant.



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12. Mr.K.V.Subramanian, learned Senior Counsel would first and foremost state that the execution of the settlement deed, being admitted by the conduct of the second defendant herself, choosing to cancel the same, there was no necessity for proving due execution of the said settlement deed in terms of Section 68 of the Indian Evidence Act, 1872. He would also rely upon the tax receipt Ex.A.2 and discharge of mortgage Ex.A.4 in order to fortify his contention that the settlement deed has been acted upon and thus, the first appellate Court has clearly fell in error in holding that the settlement deed was not acted upon and therefore, not valid in the eye of law.

13. With regard to the plea of limitation, the learned Senior Counsel would contend that the suit has been admittedly filed in the year 2000 and the cancellation of the settlement deed was only on 03.10.1996 and further, the sale in favour of the first defendant herein was much later on 06.10.1997 and therefore, the suit was well within time and could not have been dismissed on the ground of being barred by limitation. He would also state that the son was fully aware of the settlement in favour of the plaintiff, his



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sister, as he had attested the said settlement deed dated 03.01.1990 and therefore, he could not plead ignorance of the fact that the settlement deed was acted upon and even under the settlement deed, possession was handed over to the plaintiff.

14. Learned Senior Counsel would also state that the mother and son remained exparte and they did not contest the suit and therefore, no adverse inference can be drawn against them since their interest was transferred to the purchaser, subsequent to the settlement by the son in favour of the first respondent/defendant. He would also invite my attention to the finding of the first appellate Court, which has recorded that the amendment was a post trial amendment, which is contrary to fact, as evidenced in CRP No.893/2015, where this Court, by confirming the order of amendment of the trial Court, has clearly held that the amendment sought for was only a pre-trial amendment. He would also challenge the findings of the first appellate Court that the original settlement deed was not filed stating that the same would not be fatal to the case of the appellant/plaintiff, since the execution of the settlement deed has been admitted by the defendants, including the first



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respondent herein, the purchaser and therefore, non-filing of the original settlement deed cannot be held to be fatal. In support of the above contentions, the learned counsel relied on the following decisions:-

i) *Prithi Pal Singh and another vs Amrik Singh and Others*, [(2013) 9 SCC 576]

ii) *Sasikala vs Revenue Divisional Officer and another*, (AIR 2022 Mad 223)

iii).*K.Rangachari and others vs L.V.Mohan* [(2015 (2) MWN (Civil) 165]

(iv) *T.Vijayalakshmi and Ors vs Iyyappan*, (Manu/TN/0514/2022)

(v) *Logeswaridas and another vs Sachin Sandeed and Others*, (2021 SCC Online Mad 11712)

(vi) *N.Saraswathi(deceased and two others vs K.Padmavathi and others* (judgment of this Court in SA No.597 of 2008 dated 26.03.2019)



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(vii) *Durairasan vs D.Kuppuswamy and others*
(Judgment of this Court in SA No.196 of 2015 dated
29.07.2016).

(viii) *Kasi Ammal vs Vellai Gounder and another* (30
MLJ 232)

15. Per contra, Mrs.R.Gowri, learned counsel for the respondents would state that since the order in CRP No.893 of 2015 reserved all the rights of the defendants to be canvassed before the trial Court, the plea of limitation can be agitated before the Court. Merely because the amendment was allowed, it cannot be said that the amendment would relate back to the date of filing of the plaint. She would also take me through the findings of the first appellate Court regarding the original settlement deed and the discussions of the first appellate Court in that regard. Learned counsel would also refer to evidence adduced by the parties and also the discussions with regard to physical possession of the property and would state that the findings of the first appellate Court that the possession was with the



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purchaser/first defendant was found only from the oral and documentary evidence available on record. More over, learned counsel would also state that pending the suit, the plaintiff herself chose to include the prayer for relief of possession and thus, confirming the fact that the possession was not with the plaintiff, but only with the defendant.

16. Learned counsel for the respondents would also state that the suit reliefs have not been properly valued and having amended the plaint to include the relief of possession, the plaintiff has not paid the court fee for the said relief. Further, learned counsel would also contend that the relief of declaration has been valued under Section 25(d) of Tamil Nadu Court-fees and Suits Valuation Act, 1955 which is erroneous and ought to have been valued under Section 40 of Tamil Nadu Court-fees and Suits Valuation Act. Learned counsel for the respondent relied on the decision of the Hon'ble Supreme Court in the case of *S.Sarojini Amma vs Velayudhan Pillai Sreekumar* reported in *2018(6) CTC 108*.



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17. I have carefully considered the rival submissions put forth by the learned Senior Counsel for the appellant as well as the learned counsel for the respondents.

18. Admittedly, the first defendant does not deny the execution of the settlement deed in favour of the plaintiff at the first instance. However, it is the specific case of the settlor/the mother, the settlement deed Ex.A.1 was not acted upon and therefore, she proceeded to cancel the same in and by Ex.A.3 dated 03.10.1996, which was also marked as Ex.B.13 dated 03.10.1996. On the very same day, the mother also chose to execute a fresh settlement deed in favour of her son, who has been arrayed as third defendant in the suit. Both the defendants 2 and 3 viz., the mother and the brother of the plaintiff have not chosen to contest the suit and they have remained exparte through out.

19. The short question that needs to be answered is as to whether the settlement deed Ex.A.1 was acted upon or not? If the answer is in the affirmative, then the settlement cannot be revoked by a unilateral act of the settlor viz., the second defendant. If, however, it is found that if the settlement



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deed was not acted upon, then the settlement itself becomes incomplete and consequently, the settlor was entitled to revoke the same. In this light, I have perused the oral and documentary evidence adduced by the parties. The plaintiff relies on Ex.A.2, payment of tax, subsequent to the settlement in her favour and Ex.A.4 discharge of mortgage. Ex.A.2 is dated 18.10.1990 and Ex.A.4 is dated 07.12.2001. On perusal of Ex.A.2, it is seen that though the tax receipt is pertaining to the suit property, it continues to be in the name of plaintiff's mother i.e., the second defendant. Ex.A.4 is the proof of discharge of mortgage by way of registered receipt and it is dated 07.12.2001, long after the filing of the suit. Excepting these two documents, I am unable to see that the plaintiff has been able to establish that the settlement deed in her favour was acted upon and that she has accepted the gift and the gift has become complete with the handing over of possession of the suit property to the plaintiff.

20. Per contra, I am able to see from the documents exhibited by the defendants that there has been several suits in relation to the suit property and the order in I.A.No.1373 of 1997 in O.S.No.486 of 1997 has been



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marked as Ex.B.1. The first defendant has exhibited Exs.B.2 to B.4 pattas in his favour. Ex.B.5 is the order directing the transfer of patta in favour of the first defendant, dated 23.03.2009. Ex.B.6 dated 16.07.2013 is the certificate in favour of the first defendant styled as “குறு விவசாயி”. Exs.B.8 and B.9 are dated 05.02.2002, being the judgment and decree in O.S.No.475 of 1998. Ex.B.10 is also pertaining to a suit in O.S.No.603/1999 filed by one Thilagavathy. ExB.11 dated 30.12.1991 is a mortgage deed executed by the defendants 2 and 3 viz., mother and son in favour of Nachimuthu. The said mortgage has been discharged by registered receipt under Ex.B.12 on 07.10.1997. Ex.B.13 dated 03.10.1996 is the original of the cancellation deed, revoking the settlement deed in favour of the plaintiff. Ex.B.14 dated 03.10.1996 is the original of the settlement deed in favour of the third defendant/brother of the plaintiff. Ex.B.15 is the revenue record in the name of the first defendant issued by Tahsildar, Pollachi and Ex.B.16 dated 06.10.1997 is the sale deed, under which, the first defendant purchased the property from the plaintiff's mother and brother. Even though as rightly contended by the learned Senior Counsel, the documents in Ex.B.2 to B6, all pertain to records that are subsequent to the filing of the suit and cannot have



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any evidentiary value, yet, I find from the other documents exhibited by the first defendant that the first defendant has endeavoured to clear the subsisting mortgages over the suit property and moreover, has been able to prima facie establish that she has been in possession of the suit property pursuant to her purchase on 06.10.1997.

21. The first appellate Court has rightly assessed the evidence adduced by the parties, oral and documentary and found that the settlement deed was not acted upon since the plaintiff was never put in possession in pursuance of the said settlement deed. Further, even in the cancellation deed, the mother has specifically covenanted that the settlement deed was not acted upon and therefore, she was proceeding to cancel the same.

22. As seen from the decisions relied on by the learned Senior Counsel for the appellant, including the Full Bench decision of this Court in the case of *Sasikala vs Revenue Divisional Officer and Another*(AIR 2022 Mad 223), unilateral cancellation of settlement deed is not permissible in law. However, before that, it has to be first established that the settlement deed was acted



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upon in order to constitute a valid gift/settlement under Section 122 of the Transfer of Property Act, 1882. If the settlement has not been acted upon, then the gift remains incomplete and the title continues to vest with the mother/2nd defendant and it was open to her to even cancel the said settlement deed. However, if it is found that the settlement deed was acted upon, then, the settlement deed cannot be cancelled unilaterally. This is the legal position that can be culled out from the decisions that have been relied on by the learned Senior counsel for the appellant and the learned counsel for the respondents.

23. In the instant case, as already seen above, Ex.A.2 is the only document evidencing semblance of possession being with the plaintiff. However, Ex.A.2 receipt is the only with the name of the mother, as discussed herein above. Therefore, it cannot be said that by production of Ex.A.2, the plaintiff has discharged her burden to establish that the settlement deed was acted upon and that it could not be thereafter unilaterally revoked or cancelled.



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24. The other document is Ex.A.4 dated 07.12.2001 discharge of mortgage. I have already seen that the discharge of mortgage is subsequent to the filing of the suit and therefore, that will not support the case of the plaintiff, that the plaintiff is in possession of the suit property. However, on the contrary, the first defendant has been able to produce records to show that pursuant to her purchase, she has cleared all encumbrances in the suit property at her cost and she has also produced evidence to show that she has taken possession on the suit property on the date of her purchase i.e., 06.10.1997. Therefore, I do not find any irregularity or perversity in the findings of the first appellate Court that the settlement deed was not acted upon in the first place.

25. With regard to the contention of inadequate court fee raised by the learned counsel for the first respondent, I find from the plaint that after the amendment of the plaint, by including the relief of recovery of possession, the said relief has not been separately valued. However, the relief of declaration that the plaintiff is the absolute owner of the property has been valued and court fee paid thereon. When a major relief has been valued and court fee is



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paid, the consequential relief of possession need not be valued independently and further court fee paid, over again. Even otherwise, this defence ought to have been taken by the first defendant even in the trial Court. I do not find any such objection being raised by the first defendant by filing an application under Section 12 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955, questioning the improper valuation or court fee paid on the suit reliefs. Thus, I do not find any need arising to take up the issue of court fee at this second appellate stage.

26. The next is the issue regarding limitation. The suit has been filed to declare the right of the plaintiff and for recovery of possession, besides seeking declaration of the revocation of settlement deed dated 03.10.1996 and settlement deed dated 03.10.1996 and the sale deed dated 06.10.1997. The suit has been filed on 20.03.2000 and it is within three years from the date of purchase made by the first defendant. Further the relief of declaration of title can be sought for within a period of twelve years and therefore, on both these grounds, I am unable to hold that the suit is barred by limitation. However, the first appellate Court has proceeded on the basis of the



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amendment sought for by the plaintiff to include the relief of recovery of possession and finding that the suit has not been filed within 12 years from the date of amendment, the first appellate Court held that the suit is barred by limitation.

27. It is settled law that any amendment would date back to the original institution of the suit, unless and otherwise, while ordering amendment, the Court specifically makes it clear that the amendment would be prospective only. Here, I do not find any such order of the trial Court. In fact, even in the revision, there is no such specific order, except for leaving open all contentions of the first defendant to be decided during trial. Thus, this liberty cannot be equated to amendment being made prospective in nature. Thus, I am unable to sustain the findings of the first appellate Court with regard to limitation.

28. The plaintiff has chosen to amend the plaint to include the relief of recovery of possession from the first defendant. In this connection, I am unable to see any reason assigned in the plaint as to why the plaintiff seeks



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the relief of recovery of possession, excepting for vague statement that after the suit was dismissed for default and pending an application to restore the suit, the defendant took forcible possession of the suit property. The plaint is absolutely silent as to when the defendant got possession of the property thereby necessitating the plaintiff to amend the plaint. Though the plaintiff has originally stated that she has been in possession and the first defendant is trying to interfere with her possession, the plaintiff has not been able to establish that she was in possession pursuant to the settlement deed. As I have already held that both Exs.A.2 and A.4 would not enure to the benefit of the plaintiff, to prove that the plaintiff was in possession of the suit property.

29. Thus, weighing the evidence adduced by the parties in the light of the pleadings, I am unable to accept the contention of the learned Senior Counsel appearing for the plaintiff that the plaintiff was put in possession of the property pursuant to the settlement deed and therefore, the settlement deed stood complete and acted upon. As held by the Hon'ble Supreme Court in the case of *S.Sarojini Amma vs Velayudhan Pillai Sreekumar* reported in **2019 (6) CTC 108**, the gift would become complete only upon acceptance



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along with delivery of property. Only if these two criteria are fulfilled, the second defendant/mother would stand divested of her title and the plaintiff would become the absolute owner of the property.

30. The first appellate Court has rightly discussed the evidence adduced by the parties before the trial Court and also taking into account the various suits that were pending pertaining to the suit property, the factum of the first defendant/purchaser clearing all encumbrances and also overwhelming evidence produced by the first defendant, found that the plaintiff was never put in possession of the suit property pursuant to the settlement deed. The covenant for the cancellation deed executed by the mother also corroborates the fact that the settlement deed was never acted upon. In fact that is the reason stated for cancellation of the settlement deed itself.

31. Thus, I do not find any illegality or perversity in the findings



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arrived at by the first appellate Court, reversing the findings of the trial court, which were mainly on the footing that the registered irrevocable settlement deed cannot be unilaterally cancelled, without adverting to the main contention of the contesting defendant viz., the purchaser, that the settlement deed was never acted upon and was not a concluded contract of gift, in terms of Section 122 of Transfer of Property Act, 1882.

32. As rightly found by the first appellate Court, the plaintiff has not been able to substantiate that she has taken possession pursuant to the settlement deed, even though there was an express covenant in the settlement deed that possession was handed over to her. However, I am in agreement with the contention of the learned Senior Counsel for the appellant that non-mutation of revenue records pursuant to the settlement deed would not be fatal. However, the necessary vital ingredient of proving a valid gift is acceptance of the gift and also taking delivery of the property which can be established only by satisfactory evidence to show that the settlement deed was acted upon by some further act of the parties, especially on the side of the donee i.e., the plaintiff herein. Unfortunately, in the instant case, the

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plaintiff has miserably failed to establish that the settlement deed was acted upon and that she was put in possession of the property as set out in the settlement deed. On the contrary, the first defendant has exhibited the original cancellation of settlement deed as well as original settlement deed, both dated 03.10.1996 on her side. All these go to show that the settlement deed was never acted upon and the plaintiff cannot seek for declaration of title based on the settlement deed, which was not even established to be a complete gift, as required under the provisions of the Transfer of Property Act, 1882.

33. Consequently, the plaintiff cannot seek for declaration of title on the basis of the claim that the mother has no right to cancel the settlement deed and execute a fresh settlement deed in favour of plaintiff's brother. The first appellate Court has meticulously considered this aspect of the settlement deed not being acted upon and also the factum of the defendant establishing physical possession of the suit property and arrived at a finding that the plaintiff was not entitled to the relief of declaration as prayed for, including the relief of recovery of possession.

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34. I do not find any perversity or illegality in the findings of the first appellate Court, warranting interference under Section 100 of the Civil Procedure Code.

35. For the above reasons, the substantial questions of law are answered against the appellant and the Second Appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

08.03.2024

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

To
1. The Subordinate Court, Pollachi
2. The District Munsif Court, Pollachi
3. The V.R.Section, High Court, Chennai.

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P.B.BALAJI,J.

SR

Pre-Delivery Judgment
in S.A.No.666 of 2017

08.03.2024