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S.A. No.781 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.02.2024

DELIVERED ON :01.03.2024

CORAM:

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

S.A. No.781 of 2018
and CMP No.22074 of 2018

1.G.Danabalan
2.D.Muralidharan
3.D.Sivasankaran

G.Krishnamurthy (died)

4.K.Poonkodi
5.K.Muthukumar
6.K.Sivakumar
(Appellants 4 to 6 are impleaded as the legalheirs of the
deceased G.Krishnamurthy in I.A.No.17 of 2015 in
A.S.No.31 of 2013 dated 23.09.2013)

.... Appellants

Versus

T.Tamilselvi

... Plaintiff

Second Appeal filed under Section 100 of the Civil Procedure code,
against the decree and judgment passed in A.S. No.31 of 2013 dated
20.04.2018 on the file of Subordinate Judge, Tiruvarur, reversing the



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judgment and decree dated 23.09.2013 in O.S.No.24 of 2006 on the file of
District Munsif cum Judicial Magistrate Court, Nannillam.

For Appellants : Mr.C.Nithysh Sekhar

For Respondent : Mr.M.Thamizhavel

JUDGMENT

The defendants 1 to 3 are the appellants in the present Second Appeal.

The parties are described as per their litigative status before the trial Court.

2. The facts on which the plaintiff filed a suit for permanent injunction, are that the suit property belongs to the plaintiff and the plaintiff is in possession and enjoyment of the suit property. The defendants 1 and 4 are the brothers of the plaintiff and the defendants 2 and 3 are the sons of the first defendant.

3. According to the plaintiff, the suit property was settled by her father, Gopalsamy Udayar under a registered settlement deed dated 15.07.1987, pursuant to which, the plaintiff has been in enjoyment of the suit property.



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Even though, the defendants have no right in the suit property, on 15.01.2006, the defendants restrained the plaintiff from fencing the suit property and therefore, the suit was instituted.

4. The defendants filed written statement stating that the description of the suit property was incorrect and the plaintiff's father, during his life time, had cancelled the settlement deed by way of cancellation deed dated 28.03.1988, which was, within eight months from the date of settlement. The plaintiff was never in possession of the suit property in pursuance of the settlement deed also and the plaintiff was fully aware of the cancellation of the settlement deed. Even the patta for the suit property continued to be only in the name of the father of the plaintiff, Gopalsamy Udayar and in fact, the father of the plaintiff had also given a representation to the Tahsildar not to cancel or transfer the patta in favour of the plaintiff. The Tahsildar also ordered the patta to be retained in the name of the father of the plaintiff and the plaintiff is fully aware of all these facts and suppressing the same, she has filed the suit. It is also contended by the defendants that the kist receipts, filed by the plaintiff, do not relate to the suit property and the alleged patta



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transfer order dated 26.12.2005 in the name of the plaintiff was without notice to the defendants and without noticing the cancellation of the settlement deed by the father himself.

5. The trial Court, on appreciating the oral and documentary evidence, dismissed the suit finding that the plaintiff has not proved her possession and enjoyment of the suit property.

6. The plaintiff preferred an appeal in A.S.No.31 of 2013. The first appellate Court reversed the findings of the trial Court, thereby decreed the suit filed by the plaintiff. Aggrieved by the decree of the first appellate Court, the defendants have preferred the Second Appeal.

7. On 12.12.2018, this Court admitted the Second Appeal on the following substantial questions of law:-

1. Whether the Lower Appellate Court is correct in law in set aside the Judgment and Decree of the Trial Court



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totally overlooking the fact that the suit is one for injunction and the plaintiff has not proved his possession?

2. Whether the Lower Appellate Court is correct in law in overlooking the axiomatic principle of law that the plaintiff has to succeed on the strength of his case and not the weakness of the defense?

3. Whether the Lower Appellate Court was correct in law in overlooking the petition for amendment filed by the plaintiff in I.A.No.8 of 2014 where she sought to amend the plaint to include the prayer of declaration and possession thereby admitting that she was not in possession of the suit property?”

8. I have heard Mr.C.Nithyash Sekhar, learned counsel for the appellants and Mr.M.Thamizhavel, learned counsel for the respondent and I have also gone through the pleadings, documents, oral and evidence and the judgment of the Courts below.



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9. First and foremost, I find that the suit has been filed for a bare injunction. On going through the plaint, it is evident that the plaintiff has rested her case only on the settlement deed, executed by her father. There is no mention about the alleged cancellation deed executed by the father dated 28.03.1988, even though the suit was filed long after the said cancellation and also even the life time of the father, who died on 19.12.1992, which is not in dispute.

10. According to the appellants, they have been in possession of the suit property and at no point of time, the plaintiff was in physical possession of the suit property. Moreover, it is their specific case that the plaintiff chose to remain silent until the demise of her father and never raised the issue of her father choosing to cancel settlement deed during his life time.

11. The short point remains for consideration is as to whether the plaintiff has established her possession in the suit property. Apart from the settlement deed executed by her father in Ex.A.1, the plaintiff has filed kist receipts for the Fasli 1396 and 1397 by Ex.A.2; kist receipts for Fasli 1414 by



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Ex.A.3 and patta transfer order in the name of the plaintiff by Ex.A.4 and Chitta in the name of plaintiff by Ex.A.5.

12. The defendants, however, in order to establish their possession, have filed photographs Exs.B.1 and B.2,; cancellation of the settlement deed – Ex.B.3; letter written by father of the plaintiff, Gopalsamy Udayar to Tahildar not to cancel his patta or remove his name Ex.B.4, the proceedings of the Tahsildar to the father of the plaintiff Ex.B.5; Adangal in the name of the father of the plaintiff; Ex.B.6, Encumbrance Certificate for the period 1986 to 2000 Ex.B.7.

13. It is seen from Ex.A.4 patta that originally, the patta stood in the name of the father, Gopalsamy Udayar and thereafter, it was mutated in the name of the plaintiff. Ex.B.5 Proceedings of the Tahsildar also established the fact that until February 1989, patta was only in the name of the father as the proceedings clearly indicate the fact that the plaintiff and her father were called upon for an enquiry to be held on 15.02.1989. In the teeth of the cancellation of the settlement deed 28.03.1988 and the necessity of the



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Proceedings of the Tahsildar Ex.B.5 dated 15.02.1989, it cannot be stated that the plaintiff was not aware of the cancellation deed executed by her father. The plaintiff has therefore clearly suppressed the factum of cancellation of the settlement deed executed by the father in March 1988. Only pursuant to Ex.A.4 patta, the plaintiff has paid kist receipts in her name and has also managed to transfer chitta and adangal in her name. All these are pursuant to the cancellation of the settlement deed by the father of the plaintiff.

14. One another factor that stares on the face of the plaintiff is that very cleverly she has obtained the Encumbrance from 1991 onwards and it is crystal clear that she wanted to avoid the cancellation of the settlement deed being reflected in the encumbrance certificate. However, the defendants have filed Ex.B.7 encumbrance certificate for the period from 1986 to 2006 which reflects the cancellation of the settlement deed. Even Ex.A.4 patta transfer order is just prior to the filing of the suit. The order itself states that the application for transfer of patta was received on 26.12.2005 from the plaintiff and surprisingly without any notice to the other legal heirs of the father,



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Gopalsamy Udayar, the Zonal Deputy Tahsildar has ordered transfer of patta on the very next day i.e., on 27.12.2005 and soon thereafter, the suit has been filed in April 2006. Therefore, I am unable to rely on the exhibits filed on the side of the plaintiff to establish her possession. Even assuming for a moment, without admitting that the father did not have the right to unilaterally cancel the settlement deed, even then, the suit is only for a bare relief of permanent injunction to restrain the defendants from interfering with the plaintiff's alleged peaceful possession and enjoyment. Having come to the court with such a case, it is the bounden duty of the plaintiff to adduce sufficient oral and documentary evidence to show that the plaintiff has been in possession of the suit property.

15. On the contrary, the document, exhibited by the defendants in Ex.B.6 adangal, in the name of the father Gopalsamy Udayar, kist receipts Ex.B.16 for the Fasli Years 1398 to 1415 and Ex.B.19 adangal extract, it is clear that the defendants alone are in possession. Even in the cancellation of the settlement deed Ex.B.3, the father of the plaintiff has stated that the settlement deed was never acted upon and he continued to be in possession



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of the suit property.

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16. The learned counsel for the appellants would state that for a gift/settlement to be complete, it requires the donee to accept the gift/settlement. In other words, the gift/settlement should be acted upon. From the reading of Ex.B.3 cancellation deed, it is seen that the settlement deed was never acted upon and the father of the plaintiff continued to be in possession, which is evidenced and is confirmed by Ex.B.6 as well as Ex.B.16 series. Though the learned counsel for the respondent would submit that once the property has been settled in favour of the plaintiff, the father has no right to revoke the settlement deed especially when the settlor has not reserved any right of revocation in the settlement deed, I am unable to accept the said contention by applying the settled principles of law to the facts of the present case.

17. Moreover, in a gift/settlement deed of an immovable property, it is always not necessary for the donee to be put in physical possession. The donor is entitled to reserve a restricted right of residence or right of income



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from the property settled on the donee, during his life time and covenant that the possession would vest absolutely only after the life time of the donor.

18. Keeping this in mind and the evidence adduced by the parties before the trial court, I am unable to see that the plaintiff has established that she was in possession on the date of filing of the suit.

19. Learned counsel for the respondent would place reliance on the decision of the court in the case of *Arukkani (died and Others vs Subramanian)* reported in *(2007) 3 MLJ 845* where this Court held that the settlement deed alleged to have been brought about by undue influence could not be revoked, when the power of revocation was not reserved under the settlement deed. However, the facts of the present case are entirely different. The father has clearly stated that the settlement deed was never acted upon in the first place and therefore, viewed from this angle, when the settlement itself was not complete, no right would flow under such a document, even though the father had not reserved the power of revocation or cancellation of the settlement deed.



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20. Learned counsel for the respondents also placed reliance on the Full Bench Decision of this Court in the case of ***Sasikala vs Revenue Divisional Officer cum Sub Collector*** reported in ***2022 5 CTC 257***, where the Full Bench of this Court held that unilateral cancellation of settlement deed was not permissible either under the Transfer of Property Act or under the Registration Act and found fault with the Registrar, who has entertained the cancellation document. However, I find in the very same judgment, the Full Bench has also incidentally discussed the effect of revocation of a gift and the issue of unilateral cancellation of a gift deed and held that the Registrar has no power to accept a deed of cancellation to nullify the registered settlement deed.

21. Referring to Section 126 of Transfer of Property Act, 1882, the Full bench held that the Act recognised the power of revocation where the donor/settlor has reserved the right to suspend or revoke the gift on the happening of any specified event and the cancellation has to be with the



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assent of the donee and not at the will of the donor. The Full Bench further held that the registration of unilateral cancellation of gift deed could be left to the discretion of registering authorities only where the cancellation was mutual.

22. Applying the ratio laid down by the Full Bench of this Court to the facts of the present case, it boils down to a matter of fact and evidence as to whether the settlement deed was acted upon or not. According to the plaintiff, the settlement deed was acted upon. However, even according to the settlor, the father of the plaintiff, the settlement deed was not acted upon and he continued to be in possession. The Full Bench was only dealing with the power of registering authorities in the decision before it. When ample evidence is available before the civil Court, there is no impediment for a competent civil Court to go into the question and see whether the settlement deed was acted upon or not. In the present case, the trial Court had discussed the oral and documentary evidence available on record in a detailed manner and found that the plaintiff was never put in possession of the property pursuant to the settlement deed and in any event, on the date of filing of the



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suit, the plaintiff was not in possession. However, the first appellate Court, on erroneous appreciation of evidence, overturned the well considered findings of the trial court, placing reliance on the documents that were obtained closer in point of time to the filing of the suit and proceeded to decree the suit as prayed for by the plaintiff.

23. Further, even before the trial Court, an Advocate Commissioner was appointed and he filed Ex.C.1 Report and Ex.C.2 Sketch, which evidences the fact that the fourth defendant had constructed pucca R.C.C. Building in a portion of the suit property and the suit property was barren land and not nanja land. Further, the case of the defendants that there has been an oral partition in the family is also corroborated by the Report of the Advocate Commissioner, who has stated that the suit property was divided into three portions which is in line with the plea of oral partition, pleaded by the defendants.

24. The first appellate Court erred in holding that the cancellation of the settlement deed was not valid without noticing the specific evidence



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available on record with regard to the settlement deed, not being acted upon.

As rightly relied on by the trial Court in the case of ***Devasironmani and another vs Rajathangam***. reported in ***1997 3 Law Weekly 761***, this Court has held that for a gift to be complete, there has to be divesting of title and possession of the donor, resting of the same with the donee and proof of delivery and acceptance of the gift should also be established.

25. In the facts of the present case, the plaintiff has not been able to show that the gift became complete by her acceptance of the gift and also by taking over physical possession of the suit property.

26. For all the foregoing reasons, I am constrained to interfere with the findings of the first appellate court and the substantial questions of law are answered in favour of the appellants/defendants and the judgment and decree of the first appellate Court is set aside and the judgment and decree of the trial court is restored.



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27. In the result, the Second Appeal is allowed. No costs.

Consequently, connected miscellaneous petition is closed.

01.03.2024

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

To

1. The Subordinate Court, Thiruvavur.
2. The District Munsif cum Judicial Magistrate, Nannilam
3. The V.R.Section, High Court, Chennai.



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P.B.BALAJI,J.

SR

Pre-Delivery Judgment
in S.A.No.781 of 2018

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