

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.11.2014

CORAM

THE HONOURABLE MR. JUSTICE R.MAHADEVAN

A.S.No.992 of 2009

1. Uthaya Priya

2. Vaisanavadevi

(declared as major and 1st Appellant  
Udhaya Priya discharged from Guardianship  
vide order dt.25.1.12 CMP.1&2/12) ... Appellants/Plaintiffs

Vs.

1. Visalakshi

2. Senthilkumar

... Respondents/Defendants

Prayer: Appeal suit is filed under Section 96 of C.P.C. against the Decree and Judgment dated 02.04.2009 made in O.S.No.178 of 2007 on the file of the Additional District Judge (Fast Track Court-II), Salem.

For Appellants : Mr.R.Subramanian

For Respondents : Mr.D.Shivakumaran

JUDGMENT

The appellants are the plaintiffs and the respondents are the defendants in O.S.No.178 of 2007 on the file of the learned Additional District Judge, (Fast Track Court No.II), Salem.

2. The facts of the case which are necessary for disposal of the Appeal Suit, are as follows:

(i) The first plaintiff is the mother of the 2<sup>nd</sup> plaintiff. The suit property belonged to one Ganesamurthy, who is the grand father of the 2<sup>nd</sup> plaintiff. The first defendant, namely, Visalakshi, is the wife of Ganesamurthy, who had two sons, namely, Subramaniam and Senthilkumar. The said Subramaniam, who is the husband of the first plaintiff, died on 21.01.1998 leaving behind the plaintiffs and the first defendant as his legal heirs. Senthilkumar is the second defendant in the suit. The said Ganesamurthy also died on 04.06.2007 leaving behind the plaintiffs and defendants as his legal heirs, thereby, the plaintiffs are entitled to 1/3<sup>rd</sup> share and the defendants each are entitled to 1/3<sup>rd</sup> share in the entire suit properties. The

defendants, who are in joint possession and enjoyment of the suit properties, colluded together to alienate the entire suit properties including the share of the plaintiffs. In spite of repeated request for amicable partition of the suit properties by the first plaintiff, the defendants gave evasive replies. On the other hand, they attempted to grab the property of the plaintiffs. Furthermore, during the first week of November 2007, the second defendant proclaimed that he will alienate the entire suit properties, in a short while. Hence, the plaintiffs filed the suit for partition and separate possession of their 5/12<sup>th</sup> share in the suit property and also for mandatory injunction.

(ii) The 2<sup>nd</sup> defendant filed his written statement, which was adopted by the 1<sup>st</sup> defendant, stating that K.S.Ganesamoorthy, who is the father of the 2<sup>nd</sup> defendant, executed a gift settlement deed on 06.01.2006, in favour of the 2<sup>nd</sup> defendant, regarding his property, under a registered document vide Doc.No.26/2006 on the file of the Sub Registrar Office, Sankari, including the suit properties and equally, Vishalakshi, who is the mother of the 2<sup>nd</sup> defendant, had also executed a settlement deed on 28.08.2006 in favour of the 2<sup>nd</sup> defendant regarding her properties under a registered document. It is further stated that the plaintiffs have not come forward with clean hands and hence, they are not entitled to get any relief in the suit. The first defendant herein has filed a suit in O.S.No.93 of 2006 on the file of Fast Track Court No.I, Salem for partition regarding the assets of her elder son namely Subannan @ Subramani, who is the husband of the 1<sup>st</sup> plaintiff and father of the 2<sup>nd</sup> plaintiff and the same is pending. It is further stated that the plaintiffs have filed this suit by suppressing the documents and not come forward with clean hands. Hence, for these reasons, the suit is liable to be dismissed in law. After the death of Subramani, the 1<sup>st</sup> plaintiff went away from the defendants family and she got 2<sup>nd</sup> marriage and she lived with her second husband without any connection with the defendants. Such being the facts, the alleged joint possession is absolutely false. Hence, this suit is liable to be dismissed with costs.

3. The trial Court, after considering the oral and documentary evidence on either side, has dismissed the suit stating that since the second defendant had acquired right as per Ex.B1 Settlement deed and plaintiffs are not in joint possession and enjoyment of the suit properties, the plaintiffs are not entitled to claim 1/3 share in the suit property and not entitled to obtain a preliminary decree as prayed for in the plaintiff. Aggrieved by the same, the present Appeal Suit has been filed.

4. Heard the learned counsel appearing for the appellants and the learned counsel appearing for the respondents and perused the materials available on record.

5. The entire issue is on the basis of the Settlement Deed Ex.B1, which was sought to be questioned before the trial Court, wherein, upon consideration of the documents, the trial Court in para-11 of the Judgment, has observed as follows:

"11. The learned counsel for the plaintiff would vehemently contend that the alleged Ex.B1 Settlement Deed is not a genuine document and it was not executed by the father Ganesamoorthy and that there was a Government Order in the Registration Department to the effect that the photo of the executant of the document should be affixed in the document and in Ex.B1 document, the photo of Ganesamoorthy was not affixed and also no attesting witness was examined on the side of the defendants. Relying upon the Judgment of the Hon'ble High Court, reported in "2007 (3) CTC 262 (Greaves Ltd., No.13, New No.26, 2<sup>nd</sup> Line Beach Road, George Town, Chennai-1 vs. V.S.Raghavan and another), he contended that mere marking of the document alone is not sufficient to prove the contents stated in the document. On perusal of Ex.B1 Settlement Deed, it would show that the 1<sup>st</sup> defendant has put up her signature as an attesting witness. She has also signed in the document as an identifying witness. It is true that the photo of Ganesamoorthy is not affixed in Ex.B1. If there is such a rule for affixing photo at the relevant point of time, the commission and omission on the part of the Registering Authority will not in-validate the document. Since the 1<sup>st</sup> respondent has attested in Ex.B1, this Court is of the view that the said document is a genuine document and it can be relied upon. It is pertinent to note that what are the properties mentioned in Ex.B1, Settlement deed has been shown as plaint schedule properties. As per Section 123 of Transfer of Property Act, the gift deed must be registered and should be attested by the witnesses. As per Section 123 of Transfer of Property Act, Ex.B1 Settlement Deed is a valid document."

6. The trial Court also went on discussion of the joint possession and enjoyment of the suit. But, the finding related to validity of the settlement deed, i.e. Ex.B1, on the basis of the attesting witness, who was not called for examination, is not valid in law, as per Section 68 of Indian Evidence Act.

7. As per Section 68 of Indian Evidence Act, if a document is required by law to be attested, it shall not be used as evidence



until one attesting witness 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.

8. Further, the Honourable Supreme Court, in the case of Rosammal Issetheen Ammal Fernandez (Dead) by Lrs. And others vs. Joosa Mariyan Fernandez and others, reported in 2000 (7) SCC 189, held as follows:

"Under the proviso to Section 68 the obligation to produce at least one attesting witness stands withdrawn if the execution of any such document, not being a will which is registered, is not specifically denied. Therefore, everything hinges on the recording of this fact of such denial. If there is no specific denial, the proviso comes into play but if there is denial, the proviso will not apply. In the present case as we have held, there is clear denial of the execution of such document by the plaintiff, hence, the High Court fell into error in applying the said proviso which on the facts of this case would not apply. In view of this the very execution of the gift deed, Exhibit B-1 is not proved. Admittedly in this case none of the two attesting witnesses has been produced. Once the gift deed cannot be tendered in evidence in view of non-compliance of Section 68 of the Indian Evidence Act, we uphold that the plaintiff has successfully challenged its execution. The gift deed accordingly fails and the findings of the High Court contrary are set aside. In view of this no rights under this document accrue to the respondent concerned over Schedule A property which is covered by this gift deed."

9. Considering the above facts and circumstances of the case and in the light of the Judgment of the Apex Court stated supra, the Judgment of the trial Court is set aside and the matter is remanded back to the trial Court with a direction to give proper finding afresh related to issue No.2 on the validity of the settlement deed, within a period of three months from the date of receipt of a copy of this order. It is open to the respective parties concerned to raise all their objections as far as the settlement deed is concerned. The appeal is disposed of as indicated above. No costs.

The appeal is disposed off as indicated above. No costs.

28.11.2014

This matter having been listed for under the caption for clarification on 09.12.2014 pursuant to the order of this court dt.28.11.2014 and made herein in the presence of the aforesaid counsels on the either side, the court made the following order:

Clarified. No further orders required.

Sd/-  
Assistant Registrar  
Dated:12.12.14

True Copy

Sub Assistant Registrar

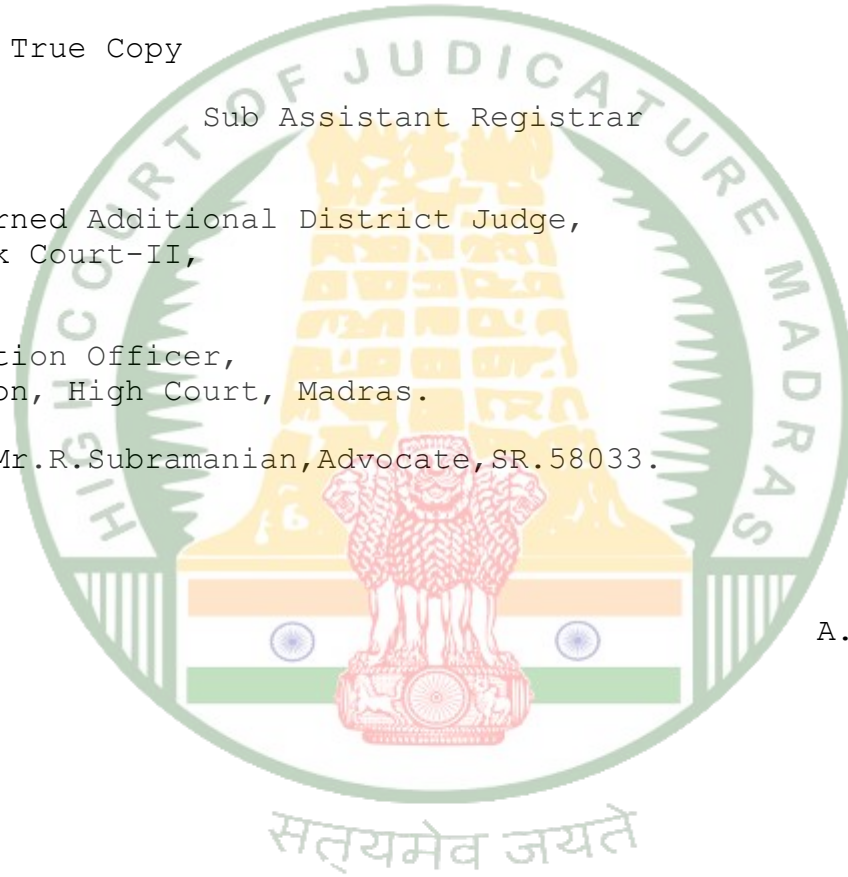
To

1.The learned Additional District Judge,  
Fast Track Court-II,  
Salem.

2.The Section Officer,  
V.R.Section, High Court, Madras.

+1 cc to Mr.R.Subramanian,Advocate,SR.58033.

tej(co)  
krd 12/12



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