

Saraswathi Vs. B.N.Ramachandran

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Court : Chennai

Decided On : Feb-25-2014

Judge : The Hon'Ble Mrs.Justice Aruna Jagadeesan

Appellant : Saraswathi

Respondent : B.N.Ramachandran

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED:

25. 02.2014 CORAM: THE HONOURABLE MRS.JUSTICE ARUNA JAGADEESAN CS.No.1036/2010 1.Saraswathi 2.Lalitha 3.Rukmani 4.T.Usha 5.Vijayalakshmi Plaintiffs Vs 1.B.N.Ramachandran 2.B.N.Gopalan 3.B.N.Venkatasubramanian 4.Nagalakshmi Seshatri Defendants Prayer:- This Civil Suit is filed under Order IV Rule 1 of Original Side Rules and Order VII Rule 1 of CPC for the reliefs as stated therein. For Plaintiffs : Mr.V.K.Vijayaraghavan For Defendants : Mr.P.B.Balaji-D1 & D4 Mr.Aruna Ganesh-D2 Mr.V.S.Nagrajan-D3 JUDGEMENT This civil suit has been filed to (a) pass a preliminary decree for partition of 5/9th share of the Plaintiff in the suit property, (b) appoint a Commissioner with a direction to divide the suit property by metes and bounds considering the convenience of enjoyment of property by the parties, (c) pass a final decree in terms of Commissioner's report, (d) direct the Defendants 1 and 3 to pay mesne profits lawfully due to the Plaintiffs from the date of the plaint and (e) grant costs.

2. The plaint averments are as follows:- a. The suit property originally belonged to the Plaintiffs' father B.S.Nanjunda Iyer, who died on 10.11.1986, leaving behind the Plaintiffs and the Defendants to succeed jointly his estate. The mother of the Plaintiffs predeceased her husband. The 4th Defendant is the sister of the Plaintiffs and the Defendants 1 to 3 are their brothers. The father of the Plaintiffs purchased the suit property under the registered sale deed dated 3.3.1951 (Doc.No.162/1951) and he constructed a house for his family in the suit property consisting of Ground and I Floors. After the demise of B.S.Nanjunda Iyer, the Plaintiffs and the Defendants are having 1/9th share each in the suit property. The suit property has not been divided among the sharers for a long period, since the sharers have had no love loss among themselves. In addition to the suit house, the father of the Plaintiffs constructed a garage on the south eastern corner of the property, which was later converted into an outhouse. The outhouse is in the possession of the 3rd Defendant permissively and he is living with his wife in the said house. In fact, the 1st Defendant some time back developed desire for a family arrangement among the sharers and prepared a draft for division and allotment of the suit property to the sharers, however, the same did not materialize for reasons not known to others. b. In so far as the main house is concerned, the 1st Defendant is in possession of ground floor and the upstairs portion of it is vacant. During family functions and on important occasions, all the family members used to meet and greet each other in the said portion. The 4th Plaintiff became vexed over the delay in making division of the suit property caused by the Defendants 1 and 3 issued a legal notice on 29.9.2010 to them and other sharers for division of the suit property. A reply notice was sent on 14.10.2010 by the 2nd Defendant, stating that he was not desirous of receiving his 1/9th share in the suit property, however, he is entitled to 1/9th share. In the reply notice, the 2nd Defendant has stated that the father of the Plaintiffs gave the ground floor to the 1st Defendant by way of gift. The 4th Defendant was allowed to occupy the upstairs portion for a long time, as she had lost her husband, however, she vacated the said portion, because of the attitude of some members of the family. The Plaintiffs are jointly entitled to 5/9th share in the suit property. As the steps taken for division proved dismal failure and as the last attempt to divide the suit property made on 29.9.2010 became fruitless, this civil has been filed for the

reliefs as stated above.

3. In the Written Statement filed by the 1st Defendant, it is averred as follows:- a. The Plaintiffs have not come with clean hands and have suppressed the material facts and circumstances. The relationship between the Plaintiffs and the Defendants and purchase of the suit property by their father are admitted. Their father constructed the ground floor in 1952 and the first floor in 1954 and he died on 10.11.1986. The 1st Defendant has been all along living with his father and as the eldest son, he has incurred substantial expenses in maintaining the family and also celebrating the marriages of the Plaintiffs and also the 4th Defendant. The mother of the parties died intestate on 13.4.1980. By settlement deed dated 14.8.1983 registered as Doc.No.1162/1983, their father settled the land to an extent of 566 sq.ft. with absolute right together with the entire constructed ground floor areas in favour of the 1st Defendant. Though in the document, the father of the 1st Defendant has inadvertently mentioned the plinth area as 1000 sq.ft. it is not reflecting the correct extent, which is actually 1986 sq.ft. being the main building and 172 sq.ft. of asbestos shed area, which is annexed to the main building, apart from the outhouse portion, in which the 3rd Defendant is residing and the land of an extent of 566 sq.ft. which is the cow shed constructed area of an extent of 566 sq.ft. of land settled to the 1st Defendant. The revenue records have been mutated in the name of the 1st Defendant and he has been paying necessary statutory charges. The 1st Defendant has been spending for the maintenance and up keep of the entire property out of his own earnings. Since the Plaintiffs were not agreeable for the reasonable proposal given by the 1st Defendant, the same did not materialize. The 3rd Defendant was put in possession of the outhouse portion even when their father was alive and as soon as the 3rd Defendant was married. b. The 4th Defendant was occupying the entire first floor till October 2006. She vacated the said portion because of her physical ailments and it has been kept vacant. The 1st Defendant received a legal notice on 1.10.2010 and he also sent a reply notice on 12.10.2010 and a final reply notice was sent on 24.10.2010 to the counsel of the Plaintiffs and the said notices were returned 'unclaimed'. Having stated that the Plaintiffs have absolutely no objection to honour their father's wish in regard to the gift deed executed, the Plaintiffs cannot main the suit for 5/9th share in the suit property. In fact, even the

4th Plaintiff sent emails as early as February 2008 and in October 2009, clearly indicating the knowledge of the settlement of a portion of the property in favour of the 1st Defendant. Therefore, it is not open to the Plaintiffs to claim 1/9th share each in the suit property. After the settlement of ground floor constructed area in favour of the 1st Defendant, the available property for division is 4611 sq.ft. Therefore, what is available is only the first floor of a built up area of 1649 sq.ft. or thereabouts and 4611 sq.ft. of undivided land, which can be divided into 9 shares and subsequently, each of the party is entitled to 512.33 sq.ft. in the land and also proportionately in the building viz. first floor of an extent of 1649 sq.ft. The father of the Plaintiffs was having interest in the ancestral property in Dharmapuri, which was sold subsequent to his demise in 1995 and his share out of the sale proceeds was Rs.2,25,000/- and the same was distributed only amongst the Plaintiffs equally and the Defendants did not take any share from the said sale proceeds and the Plaintiffs executed general powers of attorney in his favour and in favour of the 2nd Defendant on 21.2.1992 and 27.12.1991 respectively. The Plaintiffs cannot claim to be in joint possession of entire 6000 sq.ft. and if they want to maintain the suit for the entire property, then the suit is bad for under valuation and the Plaintiffs are required to pay additional court fee, since they are not and cannot be in joint possession of the property already settled in favour of the 1st Defendant. The 1st Defendant is not liable to pay any mense profits. The 1st Defendant has not been getting a single rupee as rental income from the property and he is only in self occupation of his own absolute portion having been settled on him by his father and his possession is not as a co-owner. The 1st Defendant is paying all taxes, charges and other public charges for the entire property. In view of the discrepancy in the extent of the ground floor as mentioned in the settlement deed favouring the 1st Defendant and in view of the fact that the 1st Defendant is also entitled to a preliminary decree in respect of the balance available property, the 1st Defendant is preferring this counter claim. In the above said facts and circumstances, this civil suit is liable to be dismissed.

4. In the Reply Statement filed by the plaintiffs, it is averred as follows:- a. On 29.6.2011, the 1st Defendant gave a copy of the settlement deed dated 31.3.1983. The Plaintiffs do not accept the truth, validity and enforceability of the settlement deed and the 1st Defendant has to prove the same and the original deed has not

been filed into court till date. The recitals in the settlement deed show that the 1st Defendant was given built up portion of 1000 sq.ft. only in addition to 566 sq.ft. of land and half share of 823 sq.ft. in the land, which is measuring 411 = sq.ft. over which ground floor building was constructed in the suit property. It is seen from the deed that the 1st Defendant was given totally 977 = sq.ft. of land in the plot measuring 6000 sq.ft. purchased by their father. Even if the said deed is true, the 1st Defendant cannot claim any extent over and above 977 = sq.ft. The Plaintiffs were not aware of the said settlement deed and the 1st Defendant did not claim any right on that basis. The buildings in the suit property cannot be divided conveniently or equitably for allotment. b. The Plaintiffs are jointly entitled to 2790 sq.ft. of land (major sharers). Their share in the land can be set apart conveniently and it has to be demarcated on ground and given to them for their enjoyment. The parents of the Plaintiffs always desired to benefit their daughters. The 1st Defendant has been deliberately and falsely contending that he was given 2158 sq.ft. of building when the settlement deed purported to have been executed by their father was silent and did not refer the said extent. The 1st Defendant was not given 1986 sq.ft. in ground floor 172 sq.ft. with asbestos roof area and the outhouse portion, in which 3rd Defendant is residing. The father of the Plaintiffs did not accommodate the 3rd Defendant in the outhouse. The allegation that the balance extent available for partition is 4611 sq.ft. only is not true. Regarding the sale of ancestral property, all sharers were given their share amount. The 1st Defendant is liable to pay profits. The 1st Defendant is not entitled to the declaration as though he is the owner of 2158 sq.ft. being the ground floor shown in Schedule B and similarly, he is not entitled to preliminary decree as claimed by him in prayer C. c. The Defendants 1, 3 and 4 colluded with each other to do harm to the rights of other sharers. The 1st Defendant wanted the Plaintiffs to give up their rights in the suit property for nominal amount, which request was turned down and there was no proposal for division of first floor as contended by him and the 1st Defendant cannot attempt to seek division of first floor alone. The Plaintiffs are in joint possession of entire 6000 sq.ft. The 1st Defendant is not entitled to preliminary decree as prayed for and the settlement deed has been introduced to snatch the right of the other sharers in the property. Without demolishing all the existing buildings in the suit schedule, allotment of suit land cannot be made to the

Plaintiffs and unless the counter claim is rejected, the Plaintiffs will be seriously prejudiced.

5. The following issues were framed for determination:- 1.Whether the settlement deed dated 14.8.1983 claimed to have been executed by the father of the Plaintiffs in favour of the 1st Defendant is true, valid and enforceable and was acted upon?. 2.Whether the 1st Defendant is entitled to 1389 sq.ft. of land out of the total extent of the suit property (land) by virtue of the settlement deed dated 14.08.1983?. 3.Whether an extent of 4611 sq.ft. of land alone is available for division among the Plaintiffs and the Defendants?. 4.Whether the Plaintiffs are entitled to 5/9th share in the entire suit property as claimed by them?. 5.Whether the Plaintiffs are entitled to a decree for partition directing division of the entire suit property into 9 equal shares allotment of 5 such shares consecutively for the Plaintiffs?. 6.Whether the 1st Defendant is entitled to a declaration that he is the absolute owner of the entire ground floor portion to an extent of 2158 sq.ft. described in the 'B' Schedule to the Written Statement?. 7.Whether the 1st Defendant is entitled to a preliminary decree for partition declaring him to be entitled to 1/9th share in the portion not covered by the settlement deed dated 14.8.1983, namely, 4611 sq.ft. of land and 1649 sq.ft. of built up area in the first floor?. 8.Whether the Plaintiffs are entitled to mesne profits?. 9.To what other reliefs the parties are entitled to?.

6. On the side of the Plaintiff, PW.1 was examined and Ex.P1 to Ex.P5 were marked. On the side of the Defendants, DW.1 was examined and Ex.D1 to Ex.D8 were marked.

7. This court heard the learned counsel on either side and also perused materials on record.

8. The plaintiffs 1 to 5 and 4th defendant are sisters and the defendants 1 to 3 are their brothers. There is no dispute that the suit property is the absolute property of the deceased B.S.Nanjunda Iyer, the father of the plaintiffs and the defendants. His wife predeceased him. B.S.Nanjunda Iyer was a Government Servant and retired as Deputy Commercial Tax Officer. He has purchased the suit property by a registered sale deed dated 03.03.1951 marked as Ex.P1. He constructed a house in the suit property consisting of ground and first floors. He died on

10.11.1986. The present suit is filed for partition by the plaintiffs seeking for 1/9th share each in the suit property. Pending the suit, the second defendant filed a memo, submitting to the decree and claiming 1/9th share in the suit property. The 3rd defendant though contested the suit by filing a separate written statement, but did not chose to examine himself before the court. His contention that the deletion of Section 23 of the Hindu Succession Act, 1954 is not retrospective and the dwelling house/suit property cannot be partitioned, until the sons of Nanjunda Iyer chose to partition the same, is untenable. It is no doubt true that by amendment to the Hindu Succession (Amendment) Act, 2005 (39 of 2005), deleting Section 23 of the Hindu Succession Act came into force on 9.9.2005 and it shall have prospective effect. But, the present suit has been filed on 20.12.2010 and therefore, the plaintiffs are entitled to seek for partition of the dwelling house, even though male members might be in occupation of the dwelling house.

9. Before filing the suit for partition, the 4th plaintiff had issued a legal notice in Ex.P3, to which, though the 1st defendant has not issued any reply, but the second defendant had sent a reply in Ex.P5 that their father had gifted the ground floor portion of the suit house to the first defendant. The plaintiffs, in paragraph (k) of the plaint, referring to the said reply notice, has pleaded that the gift/settlement deed was not true and not acted upon and to the knowledge of the plaintiffs no such deed was executed nor was let known to the other members of the family. Thus, the plaintiffs have denied the execution of the settlement/gift deed by Nanjunda Iyer in favour of the first defendant. Only in the written statement filed by the first defendant, he has stated that their father executed a settlement deed dated 14.8.1985, settling the land in extent of 566 sq.ft. with absolute right together with entire constructed ground floor area, in favour of the defendant.

10. In his cross-examination, DW.1 admitted that he had not informed his sisters as to his right under Ex.D5 settlement deed and stated that he had no occasion to show the documents to his sisters. His further admission is that for the first time, the settlement deed is exhibited during evidence and he did not communicate to his sisters about the right given to him in Ex.D5 settlement deed. So, it is evident that the plaintiffs were not aware of the settlement deed till it was exhibited before the court. No knowledge could be imputed from the emails sent on the side of the

Plaintiffs.

11. The execution of settlement deed is specifically denied by the plaintiffs. The pleadings regarding the execution of the deed of gift/settlement was stated for the first time in the written statement filed by the first defendant. In the reply notice, a casual statement is made by the second defendant about the execution of the gift/settlement deed. The issue of validity of the execution of the deed of settlement has been taken up by the plaintiffs and specifically denied in the plaint. The parties also went to trial knowing fully well that execution of settlement deed was under challenge. The first defendant knowing fully well the said factual position did not lead any evidence to establish the validity of the said document. In such factual position, the proviso to Section 68 of the Evidence Act will not be attracted. The document has to be proved in terms of Section 68 of the Evidence Act.

12. The question whether there is any denial or not should not be casually considered, as such finding has very important bearing on the admissibility of a document which has also important bearing on the rights of both the parties. The Honourable Supreme Court in AIR-2000-SC-2857 (Rosammal Issetheenammal Fernandez (Dead) By LRs and others Vs. Joosa Mariyan Fernandez and others) has held that once when there is denial made by the plaintiff, there is no doubt that the proviso will not be attracted. The main part of Section 68 of the Evidence Act puts an obligation on the party tendering any document to examine at least one attesting witness to prove the document and the same shall not be used in evidence unless one such attesting witness is examined.

13. In the present case, the plaint clearly indicated denial of execution of Ex.D5 settlement deed. Admittedly, in the present case, none of the two attesting witnesses had been examined. It is not the case of the first defendant that the attesters had died. In fact, DW.1 has stated in his evidence that he does not know as to who are the attesters to Ex.D5 and till date, he has not verified as to who are the attesters. The first defendants evidence indicated that he was present at the time of execution of the deed. It is not his case that Ex.D5 was handed over to him by his father. He has not examined the scribe. Though an attempt has been made to say that Mr.P.B.Ramanujam, Advocate had prepared the deed, but there is no

indication that he had scribed the deed. In view of the above, the very execution of Ex.D5 gift/settlement deed is not proved. Once the settlement deed cannot be tendered in evidence in view of the non compliance of section 68 of the Evidence Act, no right under this document accrue to the 1st defendant covered by Ex.D5.

14. Strangely, the 1st defendant has stated in categorical terms in his evidence that he had not accepted the settlement deed as it restricted to 1000 sq.ft. in the ground floor portion. The total extent in ground floor portion is 2158 sq.ft. Ex.D5 settlement deed in so many words recites that the settlee is given the entire ground floor portion in extent of 1000 sq.ft. together with half share in the undivided land in extent of 823 sq.ft. and 566 sq.ft. The schedule B which more fully describes the portion settled on the first defendant as undivided half share in the land in extent 823 sq.ft. and full and absolute right in the land in extent 566 sq.ft. together with the constructed portion in the ground floor having a plinth area of 1000 sq.ft. Annexure 1A also confirms the above said extent of 1000 sq.ft. of constructed portion referring to 800 sq.ft. of RCC Roof and 200 sq.ft. of ACC sheet.

15. The learned counsel for the 1st defendant contended that the intention of the donor can be gathered not only from the document, but from other attending circumstances and also the pleadings in the case. The learned counsel for the Defendant drew the attention of this court to the plea made in the Written Statement wherein it has been averred that his father had settled the land in extent of 566 sq.ft. with absolute right together with entire constructed ground floor area in favour of this defendant. Further, in the document, his father had inadvertently mentioned the plinth area as 1000 sq.ft. and it is not reflecting the correct extent which is actually 1986 sq.ft. being the main building and 172 sq.ft. of asbestos shed area which is annexed to the main building apart from the outhouse portion in which the 3rd defendant is residing.

16. Admittedly, Nanjunda Iyer, the settler is a literate and a graduate. He retired as Deputy Commercial Tax Officer. The evidence of DW.1 indicated that he was a capable and a shrewd person and worked as a tax consultant after his retirement. He was also appearing before the appellate authorities and tribunals. Admittedly,

the extent recited in the document was not rectified till his life time. Even the 1st defendant did not take any steps to rectify the alleged defect during the life time of the settler even after coming to know that it has been inadvertently made.

17. It is no doubt true that the intention of the parties to an instrument, gathered from outside the document may be a useful guideline in the construction of ambiguous terms of the instrument. But, when the deed itself is clear enough in showing the true scope and intention of the donor anything contra to the document, even if it is discernible from evidence, shall not whittle down or enlarge the amplitude of the express stipulations made in the document. The test is what a reasonable man would reasonably understand from the terms recited in the document.

18. In this context, it is appropriate to refer to the observation made by the Kerala High Court in *Narayani Amma Vs. Narayan Namboodiri* (1985-Ker-LJ-49) :- It is a well settled principle of interpretation that in interpreting a deed, the question is not what the parties to the deed may have intended to do by entering into that deed, but what is the meaning of the words used in the deed. The court can understand the true intent of the deed only by the words used in the deed. It does not matter what the parties, in their in most states of mind, thought, the terms meant. They may have meant different things, but still the terms or the language used in the deed should bind them. It is for the court to interpret such terms or language used in the deed. 19. In the instant case, the recitals in the operative portion and the schedule of the property in Ex.D5 do not admit of any ambiguity. The recitals in Ex.D5 contains clear extent of the property gifted to the 1st defendant and there is no need to take any indication from the other circumstances including the boundaries recited in the deed. As per the gift deed, the first defendant has been given half share in 823 sq.ft. i.e. 411 = sq.ft. He has also been given 1000 sq.ft. of built up portion in the ground floor without demarcation in the building. No boundary is given for the building. Hence, the counter claim made by the 1st defendant is not in conformity with the recitals in Ex.D5.

20. The learned counsel for the plaintiffs contended that in view of categoric admission made by the defendant that he does not accept the settlement deed,

the gift was not valid nor became complete. The learned counsel contended that in the absence of acceptance by the settlee, the property in question could not be said to have been legally transferred in favour of the 1st defendant. The learned counsel relied upon the decision of the Honourable Supreme Court reported in AIR-1997-SC-127 (Smt.Gomtibai (dead) through LRs and others Vs. Mattulal (dead) through LRs) in support of his aforesaid contention.

21. Under Section 122 of the Transfer of Property Act in order to constitute a valid gift, the pivotal requirement is acceptance of the gift. Such acceptance must be by the donee during the life time of the settler. There is no indication in DW.1s evidence that the settlement deed was accepted, when his father was alive. There is no such plea in the written statement filed by the 1st defendant. The learned counsel appearing for the plaintiffs contended that the gift settlement deed has not been accepted and in fact, the 1st defendant has in so many words in so many places in the course of his evidence had expressly stated that he is not accepting the settlement deed. The learned counsel drew the attention of this court to the entire evidence of DW.1 wherein DW.1 had stated that he is not accepting Ex.D5.

22. Acceptance of a gift by the donee is also a condition of a valid gift, inasmuch as an offer without acceptance by the donee cannot complete the gift. The acceptance of a gift can be either express or implied. The acceptance may be inferred from acts subsequent to the execution of deed of the gift. The acceptance may be implied, but the facts relied upon must be acts of positive conduct of the donee and not a mere passive acquiescence and such an acceptance must be before the death of the donor. It is no doubt true that acceptance is usually signified by an overt act such as the actual taking over possession of the property or mutation of revenue records in the name of the donee. The evidence clearly indicated that the first defendant was residing with his father and there was no occasion for handing over possession of the property to the first defendant. Hence, the contention of the learned counsel for the 1st defendant that the 1st defendant was continuing the enjoyment of property is really of no consequence. It is no doubt true that there is a specific recital in the deed that possession has been handed over to the 1st defendant. Though there is some force in the contention of the learned counsel for the 1st defendant that such recital and subsequent

mutation of records in the name of the 1st defendant would lead to a presumption that there was acceptance by the 1st defendant, but however while considering whether there was a valid gift, intention of the donor, execution of the deed and acceptance are pivotal features. The conduct of the donee in dissenting from accepting the gift as is evident from his evidence would be a significant factor and it has to be held against the first defendant that there is no valid acceptance of the gift by the 1st defendant. That apart, in the present case, the validity of the settlement deed has been specifically denied in the sense that the document had no effect in law. In such circumstances, it was necessary for the donee to have produced the attesting witnesses of the settlement deed. As already held, Ex.D5 has not been proved and it cannot confer any right on donee in respect of the suit property.

23. Admittedly, the house situates in the middle portion of the land measuring 6000 sq.ft. and passage has been set apart on all four sides. When the plaintiffs and the defendants are jointly entitled to land and building, the suit property cannot be divided equally or equitably among them. DW.1 has also admitted this in his evidence. Therefore, the suit property as admitted by the 1st defendant cannot be divided conveniently for the enjoyment of parties. Therefore, it becomes inevitable that the suit property has to be sold for division of sale proceeds among the sharers.

24. Admittedly, the defendants 1 and 3 are in enjoyment of the suit property and the 1st defendant has been in occupation of major portion of the property. The 3rd defendant is in enjoyment of the outhouse. The defendants 1 and 3 are, therefore, liable to pay mesne profits to the remaining sharers.

25. In view of the above findings, the plaintiffs are entitled to a decree for partition and division of the entire suit property into 9 (nine) equal shares and to allotment of 5 such shares consecutively to the plaintiffs. All the issues are answered accordingly.

26. In the result, this civil suit is allowed as prayed for and the Plaintiffs are entitled to 5/9th share in the suit property and there will be a preliminary decree for partition of 5/9th share of the plaintiffs as prayed for in the suit property. The

counter claim made by the 1st defendant is rejected. As the 2nd defendant has also paid court fee, he is entitled to 1/9th share in the suit property. In so far as the determination of mesne profits is concerned, it can be done in the final decree proceedings. However, in the circumstances of the case, there will be no order as to costs. Srcm

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