

G. Santhakumari Vs. G. Murthy

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Court : Chennai

Decided On : Sep-23-2016

Judge : P. Kalaiyarasan

Appeal No. : S.A.No. 491 of 2008

Appellant : G. Santhakumari

Respondent : G. Murthy

Judgement :

(Prayer: Second Appeal is preferred under Section 100 of the Code of Civil Procedure against the Judgment and Decree, dated 31.01.2007 made in A.S.No.325 of 2006 on the file of the Additional District and Sessions Judge (Fast Tract Court - V), Chennai, reversing the Judgment and Decree, dated 01.02.2006 made in O.S.No.1771 of 2003 on the file of the learned VIII Assistant Judge, City Civil Court, Chennai.)

1. This Second Appeal has been filed by the plaintiff, who lost the case in the first appellate court.

2. The plaint averments are as follows :

The plaintiff's husband Venkataiah is the original owner of the suit property under the Assignment order of the Government. He executed a settlement deed on 20.08.2001 in favour of the plaintiff. He passed away on 17.11.2001. After the

settlement deed, the plaintiff visited the suit property on 08.10.2001. She found the defendant, who is step mother's son of her husband, Venkataiah had been in possession of the suit property as a trespasser. He abused the plaintiff and drew her away. The plaintiff issued lawyer's notice on 12.10.2001 and then filed the suit.

3. The written statement of the defendant in brief is as follows : The executant of the settlement deed has no right over the suit property. Chinna Mathiah through his first wife was blessed with Venkataiah. As the first wife died, when Venkataiah was three years old, Chinna Mathiah married Kamalammal and through her he got four sons and three daughters. The defendant is one of the sons to Chinna Mathiah through Kamalammal and has been in possession and enjoyment of the suit property. The alleged settlement deed is forged one. The plaintiff is not the wife of Venkataiah and Venkataiah married only Dhanammal. Therefore, the suit is to be dismissed.

4. The trial Court after analysing both oral and documentary evidence of both sides, decreed the suit. Aggrieved by the Judgment and Decree of the trial Court, the defendant preferred first appeal and the first appellate court after considering the evidence allowed the appeal by dismissing the suit. Against the said Judgment and Decree, the present Second Appeal has been preferred.

5. The appellant has also filed a petition to receive additional document, namely the original assignment order in favour of Venkataiah. The respondent has not filed counter in this petition.

6. The Substantial Questions of Law that arises in this Second Appeal are :

"1. Whether the Lower Appellate Court is correct in dismissing the suit on the ground that Ex.A.1, Settlement Deed is not proved by examining the attesting witness to the said document, as per Section 68 of the Indian Evidence Act ?

2. Whether the Lower appellate Court is correct in holding that the appellant herein has not proved her title by producing the xerox copy of Ex.A.6(b) ?"

7. There was no representation on the side of the respondent, though the case was listed under the caption "For Disposal".

8. The learned counsel appearing for the appellant contends that due to demise of the husband of the appellant / plaintiff, she was not in a position to file the original assignment order before the trial Court and therefore, xerox copy was filed; that now she got the original order from the Collectorate and therefore, the same is to be received as additional document. It is further contended that the defendant during his cross-examination impliedly admits the settlement deed and therefore, question of examining the attesor does not arise and therefore, the appeal has to be allowed.

9. To decide the ownership, the plaintiff filed only xerox copy of the assignment order in favour of Venkataiah before the trial Court as Ex.A.6(b). The appellate Court had not accepted the above evidence. Now the original assignment order has been sought to be filed as additional evidence. For just decision of the ownership of the suit property, the above document is very much essential; that apart the reason given by the appellant that due to demise of her husband she could not produce the original before the trial Court is also acceptable. For the just decision, this Court is of the view that the above original document is to be received as additional document and accordingly the same is marked as Ex.A.7. However, opportunity has to be given to the defendant to cross-examine with reference to the above document.

10. There is no dispute that Venkataiah and the defendant are step brothers and even during the life time of Venkataiah, he filed eviction petition against the defendant and the defendant denied the ownership of Venkataiah in that petition, as could be seen from Ex.B.3 and Ex.B.4.

11. The alleged settlement deed, dated 20.08.2001 executed by Venkataiah to the plaintiff is marked as Ex.A.1.

12. It is well settled that if a document has created transfer of an immovable property in praesenti, the same is nothing but a settlement. The recitals of the settlement deed, dated 20.08.2001 clinchingly says that this property has been transferred in praesenti. The recitals reads thus :

(Language)

12. Section 63 of the Indian Evidence Act, 1925 deals with execution of unprivileged Wills. Section 123 of the Transfer of Property Act, 1882 deals with the procedure of making a gift of immovable property.

13. Section 68 of the Indian Evidence Act, 1872 relates to proof of execution of document required by law to be attested. The provision 68 and also Proviso clause can be vivisected as follows:-

(a) In the case of a Will, its execution as well as attestation must be established by way of examining an attesting witness, otherwise, the same cannot be used as evidence.

(b) In the case of a gift/settlement, it is not necessary to call an attesting witness for the purpose of proving its execution, unless its execution has been specifically denied by the person by whom it is said to have been executed.

As far as settlement deed is concerned, if its execution is specifically denied, the execution is to be proved by examining an attesting witness.

14. Here in this case, the defendant specifically denied the execution of the settlement deed by the executor namely Venkataiah. No doubt it is a registered document. When there is specific denial about the execution, the same is to be proved by examining an attesting witness.

15. Though the respondent / defendant claims to be the owner of the property, he had not produced any document to put forth his contention. Thus defendant is to be given opportunity to cross-examine as to Ex.A.7, additional document and to disprove title of the plaintiff. The plaintiff is to be afforded opportunity to prove the execution of the settlement deed. In view of giving an opportunity to the parties to establish their contentions, this Court is of the considered view that the matter has to be remitted to the first appellate Court to decide the issue afresh after giving further opportunity to both the parties to let in additional evidence, if any.

17. For the aforesaid reasons, this Second Appeal is allowed, by setting aside the Judgment and Decree of the first appellate court, dated 31.01.2007 made in A.S.No.325 of 2006 and the matter is remitted to the first appellate Court. The first

appellate Court is directed to permit the parties to adduce additional evidence if any and dispose of the matter within two months from the date of receipt of a copy of this order. No costs.

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