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Court : Chennai

Decided On : Nov-02-2012

Judge : The Honourable Mrs. Justice S. Vimala

Appeal No. : Second Appeal No.957 of 2003

Appellant : R. Dayalan

Respondent : Nagarathnam and Others

Advocate for Pet/Ap. : For the Appellant: M.V. Krishnan, Advocate. For the Respondents: R1 to R8, V. Nicholas & N.E.A. Dinesh, Advocates.

Judgement :

(Prayer:- Second Appeal filed under Section 100 of Civil Procedure Code, to set-aside the judgment of the Court of the District Munsif, Hosur made in O.S.No.418 of 1985 and confirmed by the Sub Judge, Hosur in A.S.No.133 of 1996.)

The second appeal has been filed challenging the judgment of the Subordinate Judge, Hosur, rendered in A.S.No.133 of 1996, dated 05.11.1997, confirming the decree and judgment of the Court of District Munsif, Hosur, made in O.S.No.418 of 1985, dated 22.08.1994.

2. The suit in O.S.No.418 of 1985 has been filed for the relief of declaration and injunction. The declaration is sought for in respect of two items of the suit property, namely, an extent of 4.5 acres in R.S.No.682 and an extent of 45 cents in

R.S.No.683 at Kannathur Village, Hosur Taluk, totalling an extent of 4.92 acres. The plaintiff died during the pendency of the suit and plaintiffs 2 to 9 are added as legal representatives of the deceased first plaintiff.

3. The plaintiff claimed title based upon the settlement deed, dated 21.09.1976. The defendants disputed the title of the plaintiff on the ground that the settlement deed was not valid on three grounds, (i) the settlement deed was not accepted and acted upon; (ii) settlement deed was a nominal document and (iii) the settlement deed had been cancelled by the execution of cancellation deed by the executant himself.

4. The trial court has framed the following five issues:-

(i) Whether the plaintiff is entitled to declaration and possession?

(ii) Whether the settlement deed dated 21.09.1976 was nominal? and Whether the settlement deed was acted upon?

(iii) Whether the settlement deed has been revoked by the second defendant?

(iv) Whether the plaintiff is entitled to an order of injunction?

(v) To what other relief, the plaintiff is entitled to?

5. The trial court relied upon the following circumstances to come to the conclusion that the settlement deed has been accepted and acted upon:-

(i) There had been mutation of patta (Ex.A-2) in the name of the plaintiff in respect of Survey Nos.683 and 682.

(ii) The plaintiff has paid kists in respect of the suit properties.

(iii) The evidence of P.W.5, Nagappan and P.W.6, Ganesan was available to show that the property had been in possession and enjoyment of the plaintiff.

On these circumstances, the lower court came to the conclusion that the settlement deed ought not to have been nominal.

6. Finding that the executant has no right to cancel the settlement deed de hors the provisions of Section 126 of the Transfer of Property Act and also by relying upon the decisions reported in 1980 (II) MLJ 232 (Kasi Ammal v. Vellai Gounter & another) 1985 (I) MLJ 202 (Jayalakshmi & Others v. Kaliaperumal), the trial court held that the cancellation of the settlement deed is unsustainable. On these findings, the relief of declaration and injunction has been granted.

7. Aggrieved over the judgment and decree, defendants 1 and 2 filed an appeal in A.S.No.133 of 1996. Observing that the defendants / appellants have no right to cancel the settlement deed except by the way of filing a suit for cancellation of settlement deed, the first appellate court confirmed the decree and judgment of the trial court.

8. The concurrent findings of both the courts below are under challenge in the second appeal.

9. The second appeal was admitted under the following substantial questions of law:-

"1. Whether there is no valid gift deed under Ex.A-1 as per Section 122 of the Transfer of Property Act?

2. Whether the first defendant, who was the minor on the date of Ex.A-1, was not bound by the gift deed?"

10. The substantial questions of law raised are rephrased at the time of hearing the appeal:-

"1. Whether the settlement deed under Ex.A-1 is valid?

2. Whether the first defendant who was an attester to Ex.A-1-settlement deed is bound by the settlement deed?

11. The first contention of the learned counsel for the respondent is that the execution of settlement deed having been accepted by the executant himself, the settlement deed is not open to challenge. According to the learned counsel, the cancellation of settlement deed can never improve the case of the appellant as the

cancellation which is invalid / unsustainable and against law would help only the respondents to the extent of proving that there had been the original execution/existence of the settlement deed.

11.1. This contention cannot be accepted just because the execution of document is admitted either directly or by necessary implication it does not prove the validity of document. Validity of document can be challenged on several grounds, out of which one is validity of execution.

12. On the contrary, the learned counsel for the appellant contended that the execution of settlement deed is not proved as per the legal requirement and therefore the settlement deed is not valid. It is the contention that the witnesses to the settlement deed has not spoken about due execution by the settler. This contention cannot be accepted because the execution by the second defendant has been admitted by him. But it is pointed out that the settlement deed is not valid as it contains unconscionable transaction. Several circumstances which are unnatural, critical and unexpected are pointed out.

12.1. The following are the circumstances:-

(i) (a) The competency of the executant, i.e, the competency of the second defendant is the prime issue to cloth the settlement deed with validity. It is the contention of the defendants that the second defendant has no authority to execute the settlement in respect of the property belonging to the joint property and that it did not belong to the second defendant exclusively. As per the evidence of D.W.1 (second defendant) the property is the self acquired and ancestral property of the father of the second defendant and that he inherited the same from his father. In that event, the property in the hands of the second defendant on inheritance from his father becomes the ancestral property so far as his sons are concerned.

12.2. It is pertinent to point out that D.W.1 has got two sons and two daughters as per the evidence of D.W.2. As pointed out already, whether the transferor has got right to transfer the property is the prime issue that any transferee would consider in any transaction. Even if it is a case of settlement or gift, even then, the

transferee would be inclined to know whether the transferor has got the right to transfer, atleast to the extent of avoiding future problems. So far as this case is concerned, the title to the transferor is conspicuously absent. What is the reason for this significant omission. This omission speaks volumes about the nature of the transaction. The transferee is not an unlettered person. He is a retired Tahsildar / Government employee. Therefore, in all probability, he should have enquired about the title of the transferor. When other circumstances point out cloud on the complete title of the transferor and there had been significant omission in mentioning the title of the transferor, then one may reasonably conclude that the omission was wilful, significant and it is a proof towards sham and nominal nature of transaction.

12.3. The reason alleged for the settlement is flimsy. In the recital, it is stated that the transferee has got affinity towards the family of the defendants and therefore without any monetary consideration the settlement deed was executed. It is relevant to point out that the first plaintiff has got two families, according to the evidence of P.W.1-Karthikeyan. According to his evidence, his father was living with both the families. There are as many as eight members as Legal Representatives of the deceased/first plaintiff. Under such circumstances, it is not known what is the kind of attachment / affection / affinity the first plaintiff was having towards the family of the defendants. Therefore the recital that the settlement deed was executed in consideration of the affinity of the first plaintiff towards the family of the defendants cannot be true. The deceased first plaintiff, who was not even having true love and affection towards his first family, cannot be expected to have affinity towards the defendants family.

12.4. Whether the defence taken as to the reason for execution of a sham and nominal document is convincing is the most important issue. According to the evidence of the D.W.1, (a) the first plaintiff, who was the retired Tahsildar, wanted to do contract work and for which the solvency certificate was required. For the purpose of enabling the plaintiff to get the solvency certificate, the settlement deed was executed nominally; (b) The possession was not handed over to the first plaintiff.

12.5. According to the evidence of D.W.2, Dayalan, (who was a minor at the time of execution of document) his signature was obtained in the Registrar's Office. His date of birth was 23.05.1958 (Ex.B-2). At the time of execution of Ex.A-1 settlement deed by his father, his father had debts in three banks and those debts were discharged only by his father and that the settlee was not under an obligation to discharge the debt. What was the necessity for the settlee to get the signature of the minor as the attesting witness is not explained.

It is contended by the learned counsel for the respondent that it is not open to the appellant to dispute the validity of the settlement deed as he had signed the document as an attesting witness. Whether this contention could be accepted is the issue? What is the implication of the minor signed the document as an attesting witness. Whether the minor is estopped from disputing the validity of the settlement deed just because he is shown to be the attesting witness to the document. The legal implication has been discussed in the decision reported in 100 L.W. Page 363 (K.Nagarathinam and another Vs. K.Rajammal). Relying upon the Division Bench decision of the Kerala High Court in Govindan vs. Chellamma, it was held that it is a question of fact to be determined with reference to the circumstances of each case. The relevant observation is in paragraph 10, which is extracted for convenient reference.

"10. In my view, the correct position of law is stated by a Division Bench of the Kerala High Court in Govindan v. Chellamma. Their Lordships held that there can be no doubt that an attesting witness can be shown to have fully understood the particular transaction so that his attestation may support the inference that he was a consenting party. It was also observed by their Lordships that the question, is really one of fact and should be determined with reference to the circumstances. Their Lordships relied upon the decisions of the Privy Council in Sarkar Barnard and Co. v. Alaakmanjari A.I.R. 1925 P.C. 89. Bhagwan Singh v. Ujagar Singh A.I.R. 1928 P.C. 20 : 27 L.W. 672 : 54 M.L.J. 254. In the former case, the Privy council had to consider a converse situation where a person put his signature to a document not in the capacity as a witness but as signifying his approval of the transaction, and it was held that he was not an attesting witness. In the latter case, the Privy Council held that the attestation of a deed by itself estops a man from

denying nothing whatever except that he witnessed the execution of the deed and by itself it does not show that he consented to the transaction which the document effects".

The other decision is the one reported in 2000 (II) CTC 219 (Kannappan Vs. Pargunanan and 9 others, wherein it has been held that mere attestation of a document without knowing its content will not amounts to estoppel.

In order to invoke estoppel the plaintiffs must have proved that the second defendant signed the document as an attesting witness after fully understanding the contents of the document or that contents of document were brought to the knowledge of the attesting witness. None of the witnesses examined on the side of the plaintiffs deposed that the contents of the documents were brought to the knowledge of the attesting witness. On the other hand it is specifically stated by the first defendant that he was asked to sign the document only in the Registrar's office, that his father was not along with him at that point of time and that despite his protest that he did not know anything he was asked to put his signature. When such is the nature of the evidence the contention that the minor is estopped from disputing the validity of the document cannot be accepted.

13. Pointing out these circumstances, the learned counsel for the defendants contended that Ex.A-1-settlement deed is shrouded with mystery and as the suspicious circumstances has not been dispelled by the plaintiffs, the validity of the settlement deed should not be upheld. It is also pointed out that as per the order of the UDR Tahsildar, under Ex.B-7, dated 17.10.1985, the possession of the property is only with the defendants and not with the plaintiffs. Pointing out this circumstance, it is contended that the settlement deed was neither accepted nor acted upon.

14. The issue regarding possession has to be specially analysed because the suit is filed not only for declaration but also for injunction. The plaintiffs base their claim on Ex.A-1-settlement deed, but the defendants dispute the title on the ground that settlement deed was neither accepted nor acted upon. To decide the issue whether the settlement deed was acted upon the issue regarding possession is very important.

15. To decide acceptance of settlement deed it is enough if it is shown that the settlee participated in the process of execution of settlement deed. In this case the original deed has been produced by the plaintiff himself. Whether this could amount to acceptance of the settlement is the issue. Having regard to the reasons stated for execution of settlement deed the mere possession of original settlement deed will not amount to acceptance of settlement deed. According to the evidence of the executant / second defendant, he executed the settlement deed nominally for the purpose of enabling the Retd. Tahsildar / first plaintiff to get the solvency certificate for the purpose of enabling him to undertake contract work. Therefore, the handing over settlement deed to the appellants is only strengthen the case of the second defendant as to the purpose of execution of settlement deed. Hence the presumption that the possession of the original document itself will amount to acceptance of the settlement deed will not apply to the facts of the case, having regard to the fact that the original document was given to satisfy the purpose of execution i.e., towards the purpose of obtaining solvency certificate.

16. It is contended by the learned counsel for the plaintiff that such a plea regarding solvency certificate has not been taken in the written statement. In the written statement, it is stated that the settlement deed was sham and nominal. It is suffice to say in the written statement that the execution of settlement deed was nominal. The reason for nominal execution has been stated in the evidence. Therefore the evidence cannot be rejected on the ground that it was taken as an after thought.

17. The contention of the plaintiffs is that possession has been taken over by them even as per the version stated in the settlement deed. No doubt, in the settlement deed the version is that the possession has been handed over to the first plaintiff. But this could also have been for the purpose of enabling the first plaintiff to get the solvency certificate. Therefore, it has to be seen whether actual possession was handed over to the first plaintiff. Even though evidence has been let in through some of the witnesses that possession was with the first plaintiff, the perusal of Ex.B-7 go to show that possession was not with the first plaintiff. Therefore it is clear that the settlement deed was not acted upon. In the proceedings under Ex.B-7 which arose when the first defendant wanted change of

patta. The Tahsildar has dealt with the issue regarding title and possession. The legal position discussed with regard to title is incorrect. However, so far as possession is concerned it is specifically mentioned that right from the date of execution the possession is not with the first plaintiff. The Tahsildar has specifically mentioned that an enquiry was made with regard to possession from the neighbouring owners, the Village Administrative Officers of the present and past and all of them have informed the Tahsildar that the possession is only with the defendants and not with the first plaintiff. The official order passed by the Special Tahsildar giving such an observation with regard to possession cannot be ignored. Therefore, this Court holds that the plaintiff is not entitled to decree for recovery of possession. He is not even entitled to declaration of title because the settlement deed is sham and nominal.

18. The learned counsel for the plaintiff contended that the executant of the settlement deed has no right to cancel the same and therefore, the cancellation is invalid. It is pointed out that there are no legal grounds available that would enable the second defendant to execute a cancellation deed. It is specifically pointed out that settler has not reserved expressly the right to revoke the settlement. Pointing out that those two contingencies did not arise the revocation of settlement deed by the second defendant is invalid. In support of the contention the following decisions are relied upon.

(i) (1998) III L.W. 390 (Meenakshiammal v. Ramasamy Muthiriar). In this decision, it has been held as follows:-

"126. When gift may be suspended or revoked: The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked....."

(ii) 2010 (2) CTC 379 (Kamalammal (dead) v. Girija).

"16 (vi).the law is well settled that where a donor had no power of revocation at all, he ceased to have any interest or right in the property on his divesting himself of his title in favour of the donee in which case, there is no question of donor continuing after the gift to an ostensible owner...."

(iii) 2009 (5) CTC 558 (S.Ganesan v. Bharathirajan). In this decision it has been held as follows:-

"Unilateral cancellation of registered settlement deed - permissibility. Having taken plea of ownership based upon title, adverse possession cannot be claimed.

(iv) 2007-1-L.W. 785 (Nagamuthu Gounder v. Palanivel & 6 others). In this decision, it has been held as follows:-

"It is well settled position of law that when once the settlement deed has been accepted and acted upon the executor has no right to revoke the same subsequently. In this case the executor N has also not reserved his right to revoke the settlement deed on a later date."

(v) 2003-2-L.W. 605 (Palanisamy Gounder & another v. Periammal). In this decision, it has been held as follows:-

"Once a gift is accepted and in the absence of power of revocation, the settlement cannot be revoked as provided under Section 126 of the Transfer of Property Act."

(vi) 2011-1-L.W.998 (Bharathi v. Palaniammal & Others). In this decision, it has been held as follows:-

"When the gift deed is a absolute one and it is not a conditional gift deed, the plaintiff gets absolute title under the said gift deed - Once the settlement deed has been executed and acted upon, it cannot be revoked."

(vii) 1997 (1) CTC 256 (J.Kuppuswami Mudali and Others v. Mahalingam). In this decision, the Division Bench decision of Balmakund v. Bhagwan Das, 1894 Allahabad Series 185 has been referred to and has observed as follows:-

"The delivery to the donee of immovable property of the deed of gift is sufficient to pass the title to such property to the donee without actual physical possession such property being taken by the donee."

(Viii) 1996 (II) CTC 150 (Kumarasamy Kounder, R v. V.Ezhumalai Kounder). In this decision, it has been held as follows:-

"Transfer of Property Act 1882, Section 122. Revocation of gift. Gift once accepted by or on behalf of donee cannot thereafter be revoked under any circumstances."

19. With regard to legal position as to the circumstances under which a settlement deed can be revoked, there is no dispute. The question of revocation will arise only when the existence of a valid deed is proved. Once there is valid execution of settlement deed, then only the need for revoking it will arise. In this case the settlement deed is challenged on the ground that it is sham and nominal. The facts and circumstances available in this case which are discussed in extenso, go to show that the settlement deed is sham and nominal. Therefore, execution of cancellation deed is unnecessary and it is superfluous.

20. In the case of Kaka Hajee Md. Ishaque Sahib vs Kaka Md. Saddiq Sahib And Ors., decided on 18 March, 1969 and reported in (1970) 1 MLJ 207, it has been held as follows:-

"Normally a transaction will bind a person if he or persons under whom he derives title are eo nomine parties to the same, and must be set aside before any relief is claimed thereunder. This, however, is subject to two important, exceptions : (1) Where the transaction is only a sham and nominal one, not intended to be given effect to; and (2) Where the transaction is void in law. It necessarily follows that (1) transactions to which a person or persons under whom the said persons derive title are not eo nomine parties; (2) transactions which are challenged as sham and nominal and (3) transactions which are void ab initio are not legally binding in character need not be cancelled and set aside, before any claim is made thereunder. The reason is fairly obvious. In the first group of cases, there can be no difficulty, as it is an elementary principle of law that transactions to which a person or persons under whom the said person derives title are not parties cannot

bind them. In the case of sham and nominal or void transactions comprised in the second and third group of cases, title has not passed to the transferees. Prayer for setting aside such transactions will be superfluous and the plaintiff will be entitled to ignore them altogether. The case is otherwise in respect of voidable transactions and benami transactions. In such cases the law will uphold the ostensible title conferred by those instruments; and the said title will prevail until the transactions are challenged with success by seeking appropriate reliefs declaratory or otherwise in Court of law."

21. Having regard to the legal position indicated above, the transaction, being sham and nominal, it is not necessary for the defendants to have it set-aside. For the very same reason that the transaction is sham and nominal, the plaintiffs are not entitled to have a declaration and injunction.

22. In the result, the second appeal is allowed. The judgement and decree passed in O.S.No.418 of 1985 decreeing the suit is set-aside and the judgement and decree passed in A.S.No.133 of 1996 confirming the decree and judgment in O.S.No.418 of 1985 is also set-aside. The suit in O.S.No.418 of 1985 is dismissed. No costs.

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