(2016) 09 MAD CK 0078

In the Madras High Court

Case No : O.S.A. No. 320 of 2006 and M.P. No. 1 of 2006

D. Dhanasekaran APPELLANT

Vs

V. Damodharan (Died) RESPONDENT

Date of Decision : 20-09-2016

Acts Referred:

Citation : (2017) 169 AIC 641 : (2016) 7 MLJ 280

Hon'ble Judges : Mr. A. Selvam and Mr. P. Kalaiyarasan, JJ.

Bench : Division Bench

Advocate : Mr. R. Subramanian, Advocate, for the Appellant; Mr. A. Elango, Advocate, for the Respondents No. 2 to 5

Final Decision : Allowed

Judgement

P. Kalaiyarasan, J—This Original Side Appeal is directed against the Judgment and Decree, dated 19.08.2006 of the learned single Judge made in C.S. No.701 of 2003.

2. The appellant is the first defendant. The first respondent passed away during the pendency of the appeal and his legal heirs have already been on record as respondents 2 to 5.

3. The plaint averments are as follows :

(i) The first respondent/plaintiff Damodharan married Jayalakshmi and they got three sons and two daughters, who are defendants 1 to 5. The plaintiff in his early days with great difficulties looked after the affairs of his entire family. He started his own business in 1962 by purchasing kerosene in open market and selling in retail by carrying the same in hand cart without any license. In the year 1973, the defendants 1 and 2 who had not shown any interest in their education were introduced in the plaintiff''s business and they got license for selling kerosene. Thereafter, in the year 1980, the plaintiff started a provision store. The third defendant also joined with the plaintiff in his business of provision store in 1984. The plaintiff from his income purchased the suit property in 1980 for a valuable consideration from one K.R. Lakshmana Chettiar.

(ii) The plaintiff''s wife passed away on 07.02.1990. During the life time of his wife, marriages for two sons were celebrated. Subsequently, the marriages of other children were performed by the plaintiff. The marital life of the third defendant was not happy and he divorced his first wife. The second marriage of the third defendant was also celebrated in 1996. After the death of his wife, the physical ailments of the plaintiff gets aggravated and his health deteriorated day by day. The first defendant was in a dominating position. The first defendant threatened the plaintiff and other members of the family, that it was dangerous to have the suit property in the plaintiff''s name since the first wife of the third defendant may stake a claim. Believing the representation made by the first defendant, the plaintiff executed a Will, dated 22.10.1992, bequeathing the suit property in favour of the first defendant. In the beginning of the year 1996, the first defendant insisted the plaintiff to execute and register a settlement deed in his favour relating to the suit property. The plaintiff refused to execute the settlement deed as requested by the first defendant.

(iii) Immediately, the first defendant and his family members changed their colour and started ill treating, harassing, assaulting and abusing the plaintiff. This caused the plaintiff''s physical ailments and mental distress aggravated and put him in mental depression, which led the plaintiff to become mentally degenerated and depressed and thereby the plaintiff was given treatment as an outpatient from the middle of the year 1996 till the end of the year 1999 in the Psychiatric clinic in the Government Royapettah Hospital and in the Psychiatric clinic in the Institute of Mental health. From the middle of the year 1996 till the end of the year 1999, the plaintiff, who was mentally unsound and was a puppet in the hands of the first defendant was not aware as to what happened and the plaintiff acted only according to the dictates of the first defendant. The first defendant and his family members were cordial till the end of the year 2001. The first son-in-law of the plaintiff, i.e., husband of the fourth defendant expired on 18.09.2001, which gave a great shock to the plaintiff. Although the fourth defendant managed to live in Salem with her three daughters who were in tender age for sometime till the middle of the year 2002, the fourth defendant could not manage further, approached the plaintiff and expressed her difficulties in bringing up her three daughters and sought financial assistance from her father, the plaintiff. The plaintiff who was not able to help her financially offered to provide a portion in the suit property, so that she can eke out her livelihood. When the first defendant came to know about this, immediately he confronted the plaintiff that the plaintiff does not have any right to provide a portion to his daughter, since the said property absolutely belongs to the first defendant by virtue of the two settlement deeds.

(iv) The plaintiff was shocked and surprised to hear about the settlement deeds. Immediately, the plaintiff enquired the defendants 2 to 5 and confirmed the same. He also came to know that the first defendant withdrew Rs.1,70,000/-

from the plaintiff''s account by obtaining his signatures, purchased the property jointly with the defendant. The first defendant made other defendants 2 to 5 to join with him as plaintiffs and filed a suit in O.S.No.5645 of 1997 on the file of the City Civil Court, Chennai, against the plaintiff herein for permanent injunction with respect to suit property and obtained ex parte order, after the service of suit summons. Subsequently, they withdrew the suit as not pressed.

(v) The first defendant taking advantage of the old age and physical and mental distress of the plaintiff, exercising undue influence on the plaintiff, prepared and got two settlement deed, dated 21.07.1998 and 31.07.1998 executed and registered in his favour. Therefore, the above settlement deeds have to be declared as null and void, in view of the fact that the plaintiff was mentally unsound because of his old age and mental and physical distress.

(vi) The plaintiff immediately after confronting with the first defendant about the settlement deeds, he advised to inherit the suit property equally among other brothers and sisters. As he refused to listen his advice on 02.09.2002, the plaintiff executed the documents revoking the Will, dated 22.10.1992, settlement deeds, dated 21.07.1998 and 31.07.1998 and settling the property in favour of defendants 1 to 5, after his life time.

(vii) The first defendant sent a legal notice on 03.09.2002, for which the plaintiff sent a reply, dated 16.09.2002. The first defendant also forced the plaintiff to leave the suit property in the first week of March 2003. Therefore, the suit has been filed.

4. The contention in the written statement and additional written statement of the first defendant are as follows :

(i) The averments of the plaintiff that D1''s joined in his father''s business is not correct. The first defendant obtained licence for retail selling of kerosene and also helped his brother D2 to obtain license. He also started a provisional store in his father''s name as Damodaran Stores, then he started a vegetarian restaurant under the name and style of "Carnatic Bhavan" in his wife''s name.

(ii) The suit property was purchased in the plaintiff''s name from one, K.R. Lakshamana Chettiar. The first and second defendant were doing kerosene vending business separately from the beginning itself and since they were in good terms at that time, jointly purchased two immovable properties. The second defendant also purchased two immovable properties in his name separately. The third defendant at any point of time never entered in any business. The plaintiff was entirely depending up on the first defendant and he took care of him with utmost care. The third defendant got married first time on 21.06.1992 and because of misunderstanding between them, he obtained mutual divorce. Thereafter, in the year 1996, the first defendant arranged second marriage for the third defendant. When the first defendant planned to purchase one immovable property, by seeing the condition of third defendant, who has not earned anything for his future, he registered the sale deed in his name and third defendant''s name jointly.

(iii) The third defendant''s first wife agreed for mutual divorce and she never demanded any compensation except her sreedhana articles. In the Will, dated 22.10.1992 executed by the plaintiff, the second and third defendants signed as witnesses. The plaintiff in his reply notice, dated 16.09.2002, admitted the fact of execution of irrevocable settlement deeds by him in favour of first defendant on 21.07.1998 and 31.07.1998. In these settlement deeds also the second and third defendants signed as witnesses. The suit in O.S. No.5645 of 1997 described by the plaintiff in the plaint should have been filed by the defendants 2 to 5 herein in collusion and they included the first defendant also a party in the suit without his knowledge and he is not in any way related to the above mentioned suit.

(iv) The plaintiff for the best known to him started behaved indifferently and left from his house in August 2002 and started living with second defendant. The plaintiff having executed irrevocable settlement deeds settling the suit properties in first defendant''s favour, has no power to cancel the said deeds unilaterally. The plaintiff with the ill advice of defendants 2 to 5 and the mal intention to grab the suit property from the first defendant''s possession instituted O.S. No.1343 of 2003 in the City Civil Court, Chennai for permanent injunction restraining the first defendant from in any way interfering with his peaceful possession. After execution of settlement deeds, property tax receipt and electricity connection were transferred in the name of the first defendant. The suit filed by the plaintiff is not maintainable and therefore, the suit is to be dismissed.

5. The learned single Judge framed necessary issues and after considering oral and documentary evidence of both sides decreed the suit. Aggrieved by the same, the first defendant has preferred the present appeal.

6. The appellant also filed petition seeking to permit to produce certain documents as additional documents in the appeal, saying that the petitioner/ appellant was not aware of the existence of the documents and came to know about the same only after the disposal of the suit. The respondents 2 and 3 filed their counter opposing the petition that the documents sought to be filed is only to improve the new case pleaded by the petitioner and that the petitioner came to know the existence of the documents only after the disposal of the suit is absolutely false.

7. Most of the documents now sought to be filed are with respect to license to sell kerosene and pass books. One document is the registration copy of the sale deed in favour of D4 and her husband, wherein the plaintiff signed as a witness.

8. Considering the reason given by the petitioner/appellant that he came to know the existence of the documents only subsequent to the disposal of the suit and also the fact that the registration copy of the sale deed, which is now sought to be filed will be of much helpful to the just decision of the case, this Court is of view that the documents are to be received as additional evidence on the side of

the first defendant. Accordingly, M.P.No.1 of 2006 is allowed the additional documents are marked as Ex.D.26 to Ex.D.37.

9. The learned counsel appearing for the appellant contends that the plaintiff admits, in his reply notice, the execution of the settlement deeds and no claim has been made regarding the alleged mental illness of the plaintiff during the relevant period; that mental illness has been made for the first time in the pliant; that the learned single Judge has not come to a definite conclusion whether the settlement deeds were obtained by the appellant by undue influence or the plaintiff was mentally unsound; that the appellant had no knowledge about filing of O.S.No.5645 of 1997 and might have been filed by D2 to D5 in collusion and that the irrevocable settlement deeds in favour of D1 are void.

10. The learned counsel appearing for the respondents 2 to 5 per contra contends that the appellant/first defendant having filed the suit in O.S. No. 5645 of 1997 before the City Civil Court, Chennai, along with defendants 2 to 5 against the plaintiff, making averments that the plaintiff was mentally unsound cannot blow hot and cold; that the first defendant being eldest son was in a position to dominate the Will of the others in the family and therefore, as dictated by him, the settlement deeds were executed and the learned single Judge has rightly decided the suit and therefore, the appeal is to be dismissed.

11. According to the plaint, the plaintiff takes two grounds to declare the settlement deeds as null and void; (i) that the documents were executed when the plaintiff was mentally unsound and without his knowledge and (ii) the first defendant because of his dominating position in the family by used undue influence and got executed the documents.

12. As far as undue influence is concerned, in Subhas Chander Das Mushib v. Ganga Prasad Das Mushib and others, reported in AIR 1967 SC 878, it has been held as follows :

7. The three stages for consideration of a case of undue influence were expounded in the case of Ragunath Prasad v. Sarju Prasad and others (51 IA 101) in the following words :-

"In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached-namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in, I position to dominate the will of the other.

Error is almost sure to arise if the order of these propositions be changed. The unconscionable ness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of these parties. Were they such as to put one in a position to dominate the will of the other?"

10. Before, however, a court is called upon to examine whether undue influence was exercised or not, it must scrutinise the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud. See Order 6, Rule 4 of the Code of Civil Procedure. This aspect of the pleading was also given great stress in the case of Ladli Prasad Jaiswal (1964) 1 SCR 270 at 300 above referred to. In that case it was observed (at p. 295) :

"A vague or general plea can never serve this purpose; the party pleading must therefore, be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other."

13. Therefore, the plea with respect to undue influence should be specific and the party has to plead the precise nature of the influence exercised, the manner of use of the influence and the unfair advantage obtained by the other.

14. The plaintiff in paragraph 12 of the plaint pleaded thus:

"However, during the pendency of the said suit, i.e., O.S. No. 5645 of 1997 on the file of XIII Assistant Judge, City Civil Court, Madras and before the suit is withdrawn as not pressed, the first defendant, taking advantage of the old age and the physical and mental distress of the plaintiff, exercised undue influence on the plaintiff and prepared and got the said two settlement deeds, dated 21.07.1998 and 31.07.1998 executed and registered in his favour relating to the schedule mentioned property. It is needless to state that the time of execution and registration of the said two settlement deeds dated 21.07.1998 and 31.07.1998, the plaintiff had no independent will and mind for setting the said immovable property in favour of the first defendant."

15. Only because of the relationship between the parties, it cannot be concluded that the appellant/D1 was in a position to dominate the plaintiff. The fact that the appellant/first defendant was in a dominating position is to be established only by the plaintiff. Even if that fact is established, the next factor that the execution of the settlement deeds was due to undue influence made by the appellant has to be established.

16. Here in this case on hand, both the settlement deeds were executed and registered and the same were attested by defendants 2 and 3 as witnesses. Though according to the plaintiff, the first defendant told other defendants that third defendant''s first wife might claim stake in the property, got the settlement deeds executed in her favour, the second defendant examined as D.W.1 says in his evidence that D3''s first wife did not claim for any jewels or property.

17. Though the plaintiff mentions about the suit, his contention is that he had no knowledge about the said suit and behind his back ex parte order was obtained and subsequently, the same was withdrawn as not pressed. According to him, the suit summons was not served on him. Deception is different from undue

influence. It is not the case of the plaintiff that the appellant/first defendant exercised undue influence by filing the suit in O.S. No. 5645 of 1997 and got the settlement deeds executed. The specific case is that when the plaintiff was mentally ill, the settlement deeds got executed without his knowledge by convincing the family members saying that D3''s first wife might claim a stake. There is absolutely no precise pleading as to the nature and manner of undue influence used by the appellant/first defendant.

18. Under the above circumstances, in the absence of precise pleading as to the nature and manner of undue influence exercised by the appellant/first defendant, this Court is of the considered view that the settlement deeds were not executed under any undue influence as alleged by the plaintiff.

19. Regarding mental illness, the plaintiff pleaded that he was mentally unsound from the middle of the year 1996 till the end of 1999 and during that period, settlement deeds were got executed without his knowledge. Ex.D.31 is the certified copy of the sale deed, dated 19.02.1997. Through this sale deed, property was purchased by D4 and her husband. In this, the plaintiff identified the parties and signed before the Sub-Registrar in Salem. Thus, it is seen from the records that the plaintiff was able to travel from Chennai to Salem and also put his signature as a witness before the Sub-Registrar. Therefore, the plea that the plaintiff was unsound from 1996 to 1999 is not acceptable. To establish his mental illness, the plaintiff filed O.P.chits as Ex.P.3 series, dated 11.07.1996 and 26.07.1996. The appellant/first defendant issued lawyers notice under Ex.D.16. The plaintiff sent a reply, dated 16.09.2002 under Ex.P.17. In the reply, the plaintiff admits the execution of the two settlement deeds, dated 21.07.1998 and 31.07.1998. There is no whisper about the mental illness in this reply notice

20. The settlement deeds in question are dated 21.07.1998 and 31.07.1998. Though as per Ex.P.3, he took some treatment as out patient in Psychiatric clinic in July 1996, he became alright and went to Salem and signed as witness in the sale deed in the year 1997. Therefore, the disputed settlement deeds, dated 21.07.1998 and 31.07.1998 got executed when he was mentally ill cannot be correct.

21. It is argued on the side of the plaintiff that the appellant/first defendant having filed the suit along with other defendants against the plaintiff averring that the plaintiff was mentally ill, cannot resile now and say that the settlement deeds were executed on his own volition by the plaintiff.

22. The appellant/first defendant pleads that he had no knowledge about the suit filed against the plaintiff in O.S.No.5645 of 1997. Only the plaint and the summons issued to the first defendant in that suit, who is the plaintiff in this suit alone have been filed as Ex.P.4 and Ex.P.5. Suggestion has also been put to D2, who was examined as D.W.1 when cross-examined by the appellant/first defendant that the above O.S.No.5645 of 1997 was filed by the second defendant in collusion with other defendants. When there is denial of filing of the

above said suit, it is to be established that suit was filed by the appellant/first defendant. The available documents are not suffice to establish so. Therefore, the averments of the plaint in the above suit cannot be taken as that of the appellant/first defendant. Thus, the mental illness of the plaintiff at the time of execution of disputed settlement deeds has not been established.

23. It is discernible from the recitals of both the settlement deeds that they are irrevocable. The plaintiff also admits the execution in his reply notice, Ex.D.17. The plaintiff cancelled the settlement deeds on 02.09.2002. Such unilateral revocation is not sustainable in law.

24. The settlement deeds have also come into effect and the property tax and EB connection have been changed to the name of the appellant/first defendant, as seen from Ex.D.15 and Ex.D.20.

25. For the aforesaid reasons, settlement deeds, Ex. P.4 and Ex. P.5, dated 21.07.1998 and 31.07.1998 are valid and the plaintiff is not entitled to the reliefs sought for in the suit and accordingly, this appeal has to be allowed.

26. In fine, this Original Side Appeal is allowed, by setting aside the Judgment and Decree of the learned single Judge, dated 19.08.2006 made in C.S. No.701 of 2003 and consequently, the suit is dismissed. M.P. No.1 of 2006 is allowed and the additional documents were ordered to be marked as Ex. D.26 to Ex. D.37. No costs.

