
(2012) 09 MAD CK 0027
In the Madras High Court
Case No : S.A. No. 1037 of 2001

P. Sivabushanam and Another APPELLANT
Vs
E. Sivamani and Another RESPONDENT

Date of Decision : 26-09-2012

Acts Referred:

Evidence Act, 1872 — Section 68, 79
Registration Act, 1908 — Section 60(2)
Transfer of Property Act, 1882 — Section 126, 23

Citation : (2013) 2 MLJ 102

Hon'ble Judges : S. Vimala, J

Bench : Single Bench

Advocate : A. V. Munusamy, for the Appellant; P. Srividhya for A. Muthukumar and V. Sundar, for the Respondent

Final Decision : Dismissed

Judgement

S. Vimala, J.—The plaintiffs are the appellants. The second appeal has been filed against the decree and judgment, dated 5.12.2000,

passed in A.S. No. 12 of 1996 on the file of the learned Subordinate Judge, Kancheepuram, confirming the judgment and decree, dated

18.12.1995, passed in O.S. No. 1713 of 1991 on the file of the learned District Munsif, Kancheepuram. The substantial questions of law framed

at the time of admission are as follows:

1. Whether the unconditional settlement will become invalid merely by revoking the same by the settlor without challenging the same before the

Court of law and will it not against the letter and spirit of Section 126 of the Transfer of Property Act?

2. Whether the registered unconditional settlement deed viz., Exhibit A-1 found in effective is correct as the same was not challenged by the settler

or interested persons in the Court within the prescribed time of three years?

3. Whether the settlement deed viz., Exhibit A-1 went unchallenged before the Court of law by the settler except the deed of Revocation shall

lose its validity by contesting the same by third parties claiming title under void and invalid sale deed Exhibit B-2?

4. Whether the onus of proof lies on the plaintiff with regard Exhibit A-1 being the registered settlement deed executed in their favour while the

validity of the same was questioned by the third parties claiming right under the void sale deed and as per Section 79 of the Evidence Act is it not

the duty of the persons who alleges contrary to the registered instrument should prove the same? And

5. Whether the settlement viz., Exhibit A-1 wherein the settler has affixed his thumb impression due to shivering and weak eyesight without

assigning his signatures alone shall be taken as the ground to prove against the plaintiffs while all other circumstances are in their favour?

2. The brief facts:

The plaintiffs are the owners of the property bearing Door No. 12-B located at Chairman Swaminatha Mudaliar Street, Pillayarpalayam,

Kancheepuram. The plaintiffs' grand father, Kuppuswamy Mudaliar, executed the settlement deed, dated 26.5.1981, in favour of the plaintiff out

of love and affection. The settlement deed was accepted and acted upon and the tax assessment was altered to the name of the plaintiffs in the

municipal records. Though in the settlement deed it was mentioned as undivided half share, it was actually a divided half share, which is the back

portion of door No. 12-A. The front portion had been allotted to one Ekambaram and after his death, to his legal heirs i.e., his son-the first

defendant, his wife-the second defendant and his two daughters.

3. The defendants colluded with the settlor, Kuppuswamy Mudaliar and after purporting to have cancelled the settlement deed they got the sale

deed, dated 4.11.1981 from Kuppuswamy Mudaliar as if Kuppuswamy Mudaliar, had title to the suit property. Both the revocation deed as well

as the sale deed are illegal and invalid. The settlement deed cannot be revoked as the executant did not reserve any power of revocation.

Therefore, neither the revocation deed nor the consequent sale deed are valid. The defendants maneuvered to obtain the sale deed in their favour

when the Kuppusamy Mudaliar was not in a sound and disposing state of mind. As the defendants made hostile claim, the plaintiffs have filed the suit for declaration of title. The defendants have prayed for alternative relief of decree for partition and separate possession of half share, preferably the back portion.

4. The suit was contested by the defendants under the following contentions:

- (i) The so-called settlement deed was not executed by Kuppuswamy Mudaliar;
- (ii) The alleged settlement deed was not executed freely, voluntarily and willingly;
- (iii) By making Kuppuswamy Mudaliar in an unconscious state, by injecting sedatives, thumb impression was obtained in a document purporting to be a settlement deed;
- (iv) On coming to know of the circumstances, Kuppuswamy Mudaliar executed a revocation deed on 4.8.1981;
- (v) Kuppuswamy Mudaliar sold the property in favour of the first defendant on 4.11.1981;
- (vi) Registered partition deed was executed on 10.6.1981 regarding the suit property and other items and in that suit property was allotted to the share of the first defendant;
- (vii) The suit is barred by limitation as the plaintiffs did not question the revocation deed and the sale deed within the period of three years from the date of attaining majority;

5. The trial Court framed the following six issues:

- (i) Whether the deed of settlement executed in favour of the plaintiffs came to be executed under suspicious circumstances?
- (ii) Whether the revocation of settlement deed is valid?
- (iii) Whether the sale in favour of the first defendant is valid?
- (iv) Whether the suit is barred by limitation?
- (v) Whether the plaintiffs are entitled to declaration and injunction?
- (vi) To what other relief?

6. On issue nos. 1 to 3 it was held that the settlement deed is invalid and the revocation deed is valid. Consequently, the validity of the sale deed executed by Kuppuswamy Mudaliar in favour of the first defendant has also been upheld. The trial Court has considered the following

circumstances while holding so, viz., the plaintiffs claim of title under Exhibit A-1 settlement deed. This settlement deed has been revoked by the settler himself, under Exhibit B-1-revocation deed, and thereafter the very same property has been sold to the first defendant under Exhibit B-2-document.

7. Now the question is whether Exhibit A-1-settlement deed is valid or Exhibit B-2-sale deed is valid. As Exhibit A-1 settlement deed is earlier in point of time and as the power to revoke the settlement deed is under challenge, what is the validity of Exhibit B-2 sale deed which came into existence by virtue of Exhibit B-1 revocation deed is the issue to be decided. The validity of Exhibit A-1-settlement deed, Exhibit B-1 revocation deed and Exhibit B-2-sale deed have to be considered together.

8. Learned counsel for the appellants pointed out that under Exhibit A-1 it is specifically stated that the settlement deed is irrevocable. No doubt, such recital is there under Exhibit A-1-settlement deed. The recital did not stop with the statement that there is no power of revocation, but it is also with a recital that the statement was made truly.

9. Now the question is whether the alleged statement as found in the so called settlement deed was truly made and it is valid? In other words, when the validity of the settlement deed itself is challenged on the ground of fraud and coercion and in the absence of establishment of the validity of settlement deed the question of validity of revocation will not arise for consideration. Only after proving the validity of the settlement deed and if it is found to be valid, only then the question of validity of revocation have to be considered.

10. While considering the genuineness/validity of the settlement deed, the following circumstances has to be taken into consideration:

(i) The admission made by P.W.1 during cross examination is that the executants Kuppuswamy Mudaliar was in the habit of signing the document

and the signature of Kuppuswamy Mudaliar as found in the revocation deed-Exhibit B-1 is that of Kuppuswamy Mudaliar himself. But under

Exhibit A-1-settlement deed, signature of Kuppuswamy Mudaliar is not found, but thumb impression alone is found.

(ii) When there are recitals in the revocation deed to the effect that Kuppuswamy Mudaliar used to put signature in the bank while withdrawing

money and also that in the police complaints he has put his signature, it is the duty of the plaintiffs to offer valid explanation as to why Kuppuswamy

Mudaliar did not put the signature in Exhibit A-1 settlement deed and instead, put his thumb impression. That has not been done. No doubt, under

Exhibit A-1, it is mentioned that due to old age and poor eyesight, the settlor was not able to sign, but that is proved incorrect because the settlor

has put his signature in the subsequent documents.

(iii) On the side of the plaintiffs, excepting the first plaintiff no other witness has been examined. The first plaintiff is the beneficiary under the

settlement deed. He has not signed as a witness in the settlement deed. It is not even stated in the evidence that the executant signed the document

after fully understanding the contents of the document. Therefore, the evidence of P.W.1 would not prove the execution of settlement deed.

(iii) (a) The recitals in the Revocation Deed can be construed as circumstances relating to execution of the settlement deed, dated 29.6.1981. It is

specifically stated in the Revocation Deed that the executant was administered sedatives and the thumb impression was taken while the executant

was in an unconscious state. When such is the version of the executant himself in the Revocation Deed under Exhibit B-1, then it is the duty of the

beneficiaries under the settlement deed to prove due execution of the settlement deed.

(iv) The word "execution" means the party affixing his signature or mark, signifying his assent to the contents of the document. Admission of

signature would not amount to admission of execution. In other words, admission of signature and admission of execution are not synonyms.

Viewed in this context, the contention that execution of settlement deed is deemed to have been admitted by virtue of execution of Revocation

Deed cannot be accepted.

(v) The settlement deed is a document which requires attestation by at least two witnesses (under Section 23 of the Transfer of Property Act). In

order to prove the document u/s 68 of the Indian Evidence Act, at least one attesting witness ought to have been examined. When such is a

requirement, the plaintiffs ought to have examined at least one of the attesting witnesses and that has not been done.

(vi) P.W. 1 claims to have been present at the time of execution of Exhibit A-1

document but he denies knowledge about contents of Exhibits A-5 and A-6, the documents which were executed on the same day.

Those circumstances go to show that the settlement deed ought to have been brought into existence by maneuvering.

(vii) P.W.1 has admitted that he did not chose to question the executant Kuppuswamy Mudaliar about the sale deed after coming to know about

the executing of the sale deed, in favour of the first defendant. If really Exhibit A-1-settlement deed is valid, then the natural conduct of P.W.1

would have been to question immediately, regarding the execution of sale deed in respect of the same property by the very same person. The

silence on the part of P.W.1 speaks louder about the fake transaction, than his omission to examine the witnesses to speak about the

circumstances under which the settlement deed came into existence.

11. The learned counsel for the appellant relied upon the following decisions, contenting that the settlement deed cannot be validly revoked.

(i) J. Kuppuswami Mudali and Others Vs. Mahalingam, , where-under it has been held that once it is proved that settlement deed has been

accepted and acted upon, it cannot be revoked.

(ii) Perumal Vs. Rajamanickam and Srinivasan, wherein it has been held that it is settled law that when a gift once made cannot be capriciously

recalled by the donor, for a transfer by gift is complete and binding on the parties when once completed, as any other form of transfer.

(iii) Mariyam Bivi and Others Vs. Natharsa Rowther Trust, , where-under, it has been held as follows:

6. I must, however, reject the above arguments. I do so, not in derogation of the rules of evidence quoted by learned counsel, but in affirmation of

a special rule of evidence, appropriate in this case, found in Section 60(2) of the Indian Registration Act, 1908. Under this provision, where

registration is granted by any registering authority to any instrument, such a certificate shall be admissible for the purpose of proving that the

document had been duly registered in the manner provided by the Act and that the facts set out by the registering authority in the endorsements

made by him in the instrument had all occurred as therein mentioned. This provision, no doubt, enacts only a rebut able presumption as to the facts

relating to the validity of registration, but the effect of the provision, all the

same, is to place the burden of proof squarely and unmistakably on the party who denies registration or its validity. In the present case, the appellant's definite plea in the written statement was that Natharsa Rowther died within 16 days of the execution of the document. This was not made out at the trial by way of evidence, I have, therefore, no hesitation in rejecting the contention that the registration of the trust deed was obtained by Natharsa Rowther's agent after his death.

11.1. The decision in Kuppaswami Mudali, J v. Mahalingam (supra) is applicable only when the validity of the settlement deed is proved. So far as this case is concerned, the validity of the settlement deed itself is under challenge. All the aforesaid decisions would be applicable only when the settlement deed is found to be valid.

11.2. No doubt the settlement deed is not revocable, especially when the executant did not expressly reserve the power of revocation, but the question of revocation would arise only when the validity of settlement deed is established.

12. The learned counsel for the appellants relied upon the decision in Rajamani Ammal Vs. Bhoorasami Padayachi and Another, and contended that the defendants ought to have brought a suit to set-aside Exhibit A-1-settlement deed as it is an instrument claimed to have been obtained using fraud and coercion. In other words, the contention is that it is not a void document, but it is a voidable document and therefore, as the defendants did not file a suit to set-it-aside within a period of three years from the date of execution of Exhibit A-1-settlement deed, the validity cannot be questioned now and therefore, the claim with regard to Exhibit A-1 settlement deed is barred by limitation.

12.1. This contention cannot be accepted. In the very same decision, it has been pointed out that when consent to an agreement is cast by undue influence, such an agreement is a contract voidable at the option of the party whose consent was so cast and such contract may be set-aside either absolutely or upon such terms and conditions as the Court may seem just. But, this is a case where the circumstances clearly indicate that the execution of settlement deed itself would not amount to "execution in the eye of law". There is no proof to show that witnesses saw the executants putting the thumb impression in a conscious state. The document is a fraudulent

one and it was not executed by the Settler after knowing the contents of the document. Hence, the so called settlement deed is a void document. Therefore it is not necessary to set aside the same.

13. When the settlement deed is under attack in three dimensions, the trial Court ought not to have admitted the settlement deed in evidence at all,

without examining at least one of the attesting witness. This practice invited the displeasure of Madras High Court in the decision in P. Dhanaraj

and Another Vs. M. Chellan Nadar and Others, wherein it has been held as follows:

Civil - Refunding Court fee - Suit filed for refunding the Court fee - Suit decreed - Order under challenge in present appeal - Held, in the instant

case when both the sides have not taken care to examine any witness on either side so as to prove the documents, it was strange that both the

Courts below have taken the contents of the documents as acceptable evidence in accordance with law and taken the trouble of fixing the contents

of the documents without proof regarding the case put forward by either side in their pleadings and given a decision on the cause that had arisen in

the case - Order set aside - Appeal allowed....

The Court has laid down that unless the documents filed in a case are proved in accordance with the provisions of the Indian Evidence Act, the

contents of the same should not be used as evidence. The decision in Manicka Mudaliar Vs. Shanmugasundara Mudaliar, may be looked in, in this

regard. In the instant case before us, both the sides have produced certain documents which were given exhibit numbers by the trial Court. The

trial Court as well as the lower appellate Court took the contents of those documents without any proof and have discussed regarding the

relevancy of the same. This is something alien to the well recognised principle of law relating to evidence as available in the statute book of India...

14. When there are mysterious circumstances surrounding the execution of settlement deed and when the executant himself was never allowed to

realise what he was doing then the so called settlement deed is void and this view is supported by the decision in Lakshmi Amma and Another Vs.

Talengalanarayana Bhatta and Another, wherein it has been held as follows:

Family - undue influence - whether deed of settlement was executed in circumstances which rendered it invalid and void - deed of settlement was

unnatural and unconscionable document - appellant was person of weak mind and was incapable of making his own decisions and conducting his

affair - no draft was prepared with approval or under direction of appellant - no valid reason given why testator should have given everything to

respondent and deprived himself of right to deal with property as owner during his life time - held, execution of document was not genuine.

15. The circumstances under which Exhibit A-1 settlement deed came into existence has been spelt out in the revocation deed, by the executants

himself. Therefore, the recitals in the revocation deed cannot be disbelieved. When the settlement deed is invalid, the settler has a right to execute

the sale deed (Exhibit B-2). The validity of revocation deed does not arise for consideration, as the settlement deed itself is not valid.

16. As the settlement deed is void, there is no necessity to file a suit to set aside the same. There is no proof to show that the settler understood the

contents of the settlement deed and then signed it or put thumb impression upon it. Therefore, there is no valid execution of document in the eye of

law. The registration of the document does not cloth the document with sanctity, when the execution itself is not proved.

17. The next contention of the learned counsel for the appellants is that the suit property must be partitioned and share of the appellants must be

allotted. A perusal of Exhibit B-2 sale deed, which is executed by Kuppuswamy Mudaliar in favour of Sivamani goes to show that there had been

a partition on 21.7.1962 between Kuppuswamy Mudaliar and his three sons and therefore when Kuppuswamy Mudaliar has executed the sale

deed in favour of Sivamani in respect of his separate property obtained in the partition dated 21.7.1962, there is no property left out for partition

and no property is shown to be available as a property liable to the partitioned. Therefore the claim for partition also fails. For the foregoing

reasons, the concurrent findings of both the Courts below are upheld, though for different reasons. Hence the above second appeal is dismissed.

No costs.