



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.03.2022
PRONOUNCED ON : 06.04.2022

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THE HONOURABLE MRS.JUSTICE S.KANNAMMAL

APPEAL SUIT NO.312 OF 2011

G.Sampath

...Appellant / 2nd Defendant

Vs

1.K.Shankari

2.K.Shankar (died)

3.K.Senthil ... Respondents 1 to 3 / Plaintiffs

(Respondents 1 & 3 are recorded
as L.Rs.of the deceased second
respondent)

4.G.Murugesan

5.C.Devika

6.S.Shanthi

7.M.Suriya

8.K.Baskaran

9.K.Shanmugam ... Respondents 4 to 9 / Defendants 1 & 3 to 7

(Respondents 4 to 9 are given up
by this Court dated 30.11.2021 in
A.S.No.312 of 2011 & MP No.1/2011)

Appeal against the judgment and decree, dated 17.12.2009,
passed in O.S.No.2750 of 2008 on the file of VII Additional
Judge, City Civil Court, Chennai.

For Appellant : Mr.T.Srinivasa Raghavan

For Respondents 1& 3 : No appearance

For Respondent 2 : Died

For Respondents 4 to 9 : Given up by this Court dated
dated 30.11.2021 in
A.S.No.312 of 2011



JUDGMENT

This Appeal Suit is preferred against the judgment and decree, dated 17.12.2009, made in O.S.No.2750 of 2008 on the file of VII Additional Judge, City Civil Court, Chennai.

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2. Second defendant in the suit is the appellant herein and the plaintiffs in the suit are the respondents 1 to 3 herein.

3. Suit was one for partition of the Plaintiff 'A' and 'B' Schedule properties by dividing the same by metes and bounds into seven equal shares and deliver possession of one such share to the plaintiffs; for a direction to the defendants 1 and 2 to render accounts in respect of the rental collection from the Plaintiff 'A' and 'B' Schedule properties from 01.01.2008 and further to direct the defendants 1 and 2 to pay to the plaintiffs 1/7th share from the rental collection and for costs.

4. The case of the respondents/plaintiffs, as per the plaint, was as under :

4.1. One late P.Ganesan, grandfather of the plaintiffs, had married one Manickammal and they had seven children. Defendants 1 and 2 are the sons and defendants 3 to 5 are the daughters of the said P.Ganesan. Lakshmi, mother of plaintiffs, is the second daughter of P.Ganesan and Muthuvalli, mother of defendants 6 and 7, is the first daughter of P.Ganesan.

4.2. P.Ganesan purchased the suit property bearing Old Door No.16, corresponding New Door No.37, Azeez Mulk 3rd Street, Thousand Lights, Chennai-6, measuring to an extent of 954 sq.ft. by way of a Sale Deed, dated 24.04.1989, registered as document No.352/1989 on the file of Sub-Registrar, Thousand Lights, Chennai. P.Ganesan, during his lifetime, executed a settlement deed, dated 16.06.1994, registered as document No.458/1994 on the file of Sub-Registrar, Thousand Lights, Chennai, in favour of his second daughter, namely, Lakshmi, who is the mother of plaintiffs, in respect of half portion of the above property measuring to an extent of 475.25 sq.ft and the remaining extent of 475.25 was retained by P.Ganesan, which is more fully described in Plaintiff 'A' Schedule.

4.3. P.Ganesan purchased another immovable property bearing Old Door No.18 and New Door No.3, in Azeez Mulk 4th Street, Thousand Lights Chennai-6, measuring to an extent of 500 sq.ft., by way of a Sale Deed, dated 08.05.1974, registered as document No.719/1974 on the file of Sub Registrar, Thousand Lights, Chennai, from one Kothandam and three others, which is set out in Plaintiff 'B' Schedule.



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4.4. Lakshmi, mother of the plaintiffs, died on 20.04.2007, leaving behind the plaintiffs and one K.Vijayakumar as her heirs. The said Vijayakumar died as a bachelor on 27.12.2007. P.Ganesan died on 26.12.2007, leaving behind his sons, daughters and grandchildren, as his heirs.

4.5. P.Ganesan had let out a portion of the ground and first floor in the Plaintiff 'A' Schedule property to G.T. Electronics on a monthly rent of Rs.6000/- . First defendant, who is in occupation of a portion of Plaintiff 'A' Schedule property, is collecting the monthly rent from the tenant from 01.01.2008. P.Ganesan had also let out a portion in the ground floor of the Plaintiff 'B' Schedule property to a Xerox Machine Service Centre on a monthly rent of Rs.6000/- along with a portion in first floor in Plaintiff 'B' Schedule property to Zonecom on a monthly rent of Rs.4000/-. Second defendant, who is in occupation of Plaintiff 'B' Schedule property is collecting the rent of Rs.6000/- plus Rs.4000/- from the tenants from 01.01.2008.

4.6. Plaintiffs are the legal heirs of Lakshmi, who is one of the daughters of late P.Ganesan, and are entitled to 1/7th share in Plaintiff 'A' and 'B' Schedule properties. Defendants are not agreeable for amicable partition of the suit properties. Legal notices, dated 30.01.2008 and 11.02.2008, were sent to the defendants, calling upon them to effect partition of Plaintiff 'A' and 'B' Schedule properties, but, there was no reply. Defendants 1 and 2 are collecting rents from the tenants and the plaintiffs are entitled to 1/7th share in the rentals. Hence, the suit for partition of the suit properties and for payment of 1/7th share from the rental collection and for costs.

5. The case of the appellant/defendants, in the written statement, was as follows :

5.1. First defendant contested the suit by filing a written statement, contending, inter alia, that a Will was executed by the deceased P.Ganesan on 27.08.1992, by which Plaintiff 'A' Schedule property was bequeathed in favour of the first defendant; that the total extent of 954 sq.ft. of the Plaintiff 'A' Schedule property was the subject matter of the Will, dated 27.08.1992; Lakshmi and her husband Kuppuswamy prevailed upon P.Ganesan and got the settlement deed executed in respect of half share and the plaintiffs' mother became the owner of the property; that the Will was duly probated; the suit for partition was not maintainable; the first defendant was entitled to collect the rents and profits from the Plaintiff 'A' Schedule property and, accordingly, he prayed for dismissal of the suit.

5.2. Second defendant resisted the suit by filing a written statement, stating that P.Ganesan settled the Plaintiff 'B'



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Schedule property to the second defendant in and by a Settlement Deed, dated 23.02.1996; the settlement deed was acted upon; the second defendant had been in possession and enjoyment of the 'B' Schedule property; at the time of settlement deed, there was a house with Madras terrace; after the execution of the settlement deed, the second defendant demolished the superstructure that existed then and constructed a building with a ground and two floors in the year 1997; the plaintiffs were fully aware of the demolition and new construction; necessary mutation was made in the Government records; second defendant was in possession of the Plaintiff 'B' Schedule property; second defendant had got every right to let out the property and collect rent from the tenants; the plaintiffs were not entitled to the relief; the suit for partition was not maintainable and, accordingly, he prayed for dismissal of the suit.

6. On the above pleadings, the trial Court framed the following issues for trial :

- (1) Whether the plaintiffs are entitled to 1/7th share in 'A' and 'B' Schedule properties, as prayed for ?
- (2) Whether the plaintiffs are entitled for the mesne profits ?
- (3) Whether the 1st and 2nd defendants become the owners of the 'A' and 'B' Schedule properties by virtue of the Will, dated 27.08.1992, and the Settlement Deed, dated 23.02.1996, respectively ?
- (4) To what other reliefs, the plaintiffs are entitled ?

7. During the course of trial, on behalf of the respondents/plaintiffs, two witnesses were examined as P.Ws.1 and 2 and documents Exs.A-1 to A-11 were marked. On the side of appellant/defendants, two witnesses were examined as D.Ws.1 and 2 and documents Exs.B-1 to B-11 were marked.

8. The trial Court, considering the evidence, both oral and documentary, decreed the suit as prayed for, with costs. Aggrieved over the same, this Appeal Suit is filed, at the instance of the second defendant.

9. Learned counsel for the appellant would contend that the trial Court has failed to appreciate the matter from proper perspective, which led to the suit being decreed, and, therefore, the judgment and the decree passed by the trial Court are liable to be set aside. According to him, the trial Court has grossly erred in allowing the claim of the respondents/plaintiffs on misinterpretation of facts and evidence and, therefore, the claim is liable to be rejected.



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10. Though respondents have been served and their names have also been printed in the Cause List, none appeared on their behalf. Therefore, this Court proceeds to decide the matter on merit, without adjourning the matter any further, as the appeal is of the year 2011, which is over a decade old.

11. I have heard the learned counsel for the appellant and also gone through the records.

12. The point that arises for consideration in this appeal is, whether the respondents/plaintiffs are entitled to the decree, as granted by the trial Court?

13. The suit schedule property was originally owned by late P.Ganesan, who is the father of the appellant and grandfather of respondents 1 to 3 and the same is not in dispute. The only controversy is, who is entitled to which property and to what extent, among the legal heirs of P.Ganesan, who is no more.

14. The property bearing Old Door No.16, corresponding New Door No.37, Azeez Mulk, 3rd Street, Thousand Lights, Chennai-6, measuring an extent of 954 sq.ft. was purchased by P.Ganesan by way of a Sale Deed, dated 24.04.1989, registered as document No.352/1989 on the file of Sub-Registrar, Thousand Lights, Chennai. Ganesan, during his lifetime, executed a Settlement Deed, dated 16.06.1994, registered as document No.458/1994 on the file of Sub-Registrar, Thousand Lights, Chennai, in favour of his second daughter, namely, Lakshmi, who is the mother of plaintiffs, in respect of half portion of the above property measuring to an extent of 475.25 sq.ft., which is not in dispute. The remaining extent of 475.25 was retained by Ganesan, which is the Plaintiff 'A' Schedule property, now in dispute and in which the respondents/plaintiffs sought 1/7th share. In this regard, the stand of the first defendant before the trial Court was that his father P.Ganesan executed a Will, Ex.B-1, on 27.08.1992 in his favour for the total extent of 954 sq.ft. of the Plaintiff 'A' Schedule property. On perusal of the said document Ex.B-1, what comes to be known is that the P.Ganesan executed the said Will for the entire extent of 954 sq.ft. in favour of G.Murugesan, who is the first defendant, and Lakshmi, mother of respondents/plaintiffs, jointly. Though the said Will was executed by P.Ganesan in favour of both the first defendant and the mother of plaintiffs on 27.08.1992 for the entire property, subsequently, the very same executant, namely, P.Ganesan executed a Settlement Deed, Ex.B-2, dated 16.06.1994, in favour of Lakshmi, mother of the plaintiffs, for an extent of 475.25 sq.ft., out of the total extent of 954 sq.ft. Therefore, that half portion of 475.25 sq.ft. shall remain the exclusive property of the plaintiffs and the remaining half portion of 475.25 sq.ft. remains the absolute property of the first



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defendant by virtue of Ex.B-1, Will. It is not the case of the first defendant that the entire extent of 954 sq.ft. belongs to him by virtue of Ex.B-1, Will. His only claim is that since half portion in 954 sq.ft. has devolved on respondents /plaintiffs by virtue of Ex.B-2, Settlement Deed, the remaining portion devolves on him by virtue of Ex.B-1, Will. The trial Court dismissed the said claim on the ground that the first defendant had not proved the document by examining the attested witnesses.

15. It is true, as per Section 68 of the Indian Evidence Act,1872, if a document is required by the law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. The proviso thereto also speaks to the effect that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of Indian Registration Act,1908, unless its execution by the person by whom it purports to have been executed is specifically denied.

16. Ex.B1, Will, dated 27.08.1992 is a registered document. The plaintiffs have also nowhere denied the execution of the Will. Their only point is that under Ex.B-2, Settlement Deed, an extent of 475.25 sq.ft. was bequeathed to their mother, which is not disputed by the defendant/appellant. Under Ex.B-2, the property measuring 475.25 sq.ft. remains with the plaintiffs, as they are the legal heirs of Lakshmi, and the remaining half extent devolves on the first defendant by virtue of Ex.B-1, as stated above.

17. It is also pertinent to note that the plaintiffs conveniently omitted to mark the settlement deed in favour of plaintiffs' mother Lakshmi, which was marked on the side of defendants. The boundary recitals in the Schedule of property in Ex.B2 Settlement Deed itself would disprove the case of the plaintiffs that remaining extent of 475.25 sq.ft. was retained by P.Ganesan. The property of the 1st defendant is noted as one of the boundaries in the schedule of property in Ex.B2. Furthermore, the evidence of P.W.1, in her cross examination, would categorically prove the allegations of the defendants that P.W.2, Kuppuswamy, father of the plaintiffs, who was the husband of late Lakshmi, was the main reason for filing the vexatious suit.

18. P.W.1, in her cross examination, dated 09.06.2009, had deposed as follows:

செட்டில் மெண் டு ஆவணத் திற்கு முன் நாகவே உயில் ஆவணம் எழுதப்பட்டு பதிவு செய்யப்பட்டுள்ளது என்றால் எனக்கு தெரியாது. மேற்படி உயில் ஆவணத் தின்



அடிப்படையில் என் தாத்தாவுக்கு சொந்தமான சொத்தில் பாதி பாகம் என் தாயாருக்கும், இன்னும் ஒரு பாகம் 1ம் பிரதிவாதிக்கும் கொடுக்கப்பட்டுள்ளது என்றால் சரிதான்.

She further deposed that என் தாத்தா உயில் ஆவணம் எதும் இன்றி இறந்துவிட்டதாக கூறப்பட்டது தவறானது என்றால் எனக்கு தெரியாது.

19. The father of the first plaintiff viz., Kuppuswamy, who was examined as P.W.2, in his cross examination, had deposed as follows:

தாவா “எ” செட்டியூல் சொத்தில் பாதி பாகத்தை எனது மாமனார் என் மனைவிக்கு செட்டில் மெண்டு எழுதி வைத்தார். 1974ல் மேற்படி செட்டில் மெண்டு எழுதினார். சாட்டி 1994ல் செட்டில் மெண்டு எழுதப்பட்டதாக மீண்டும் கூறுகிறார். 2007ல் மேற்படி பாதி பாகத்தை தனியாக பிரித்து காம்போன்டு கட்டினேன். எனது மாமனார் இறப்பதற்கு முன்பே இவ்வாறு சவர் வைத்து பிரித்துக்கொண்டேன். மீதி பாதி பாகம் 1-ம் பிரதிவாதிக்கு உரியது.

.....

தாவா “பி” செட்டியூல் சொத்து 2-ம் பிரதிவாதியின் அனுபவத்தில் உள்ளது. எனது மாமனாரால் 2-ம் பிரதிவாதி பெயருக்கு தாவா “பி” செட்டியூல் சம்மந்தமாக எழுதிக்கொடுக்கப்பட்ட செட்டில் மெண்டு ஆவணத்தின் அடிப்படையில் வருவாய் துறை ஆவணங்களில் உரிய பெயர் மாற்றம் செய்யப்பட்டு அவரது அனுபவத்தில் இருந்து வருகிறது என்றால் அவரது அனுபவத்தில் உள்ளது.

20. The Trial Court failed to consider the above facts and also the suppression of material facts by the plaintiffs and erroneously decreed the suit for partition with regard to 'A' Schedule Property, which is liable to be set aside.

21. Coming to the property bearing Old Door No.18 and New Door No.3, which, according to the appellant/second defendant, is New Door No.4, in Azeez Mulk 4th Street, Thousand Lights Chennai-6, measuring to an extent of 500 sq.ft., it was purchased by P.Ganesan by way of a Sale Deed, dated 08.05.1974, registered as document No.719/1974 on the file of Sub Registrar, Thousand Lights, Chennai, which is the Plaintiff 'B' Schedule, and in which the respondents/plaintiffs sought 1/7th share. In this regard, the stand of the appellant/second defendant before the trial Court was that his father, namely, late P.Ganesan executed a Settlement Deed, Ex.B-4, on 23.02.1996 in his favour for the entire extent.

22. Ex.B4, Settlement Deed, was executed on 23.02.1996 after execution of the Will, Ex.B1, on 27.08.1992, and the Settlement Deed, Ex.B2, in favour of the plaintiff's mother, Lakshmi 16.06.1994. Even after filing of the written statement about the Settlement Deed in favour of the second defendant pertaining to 'B' Schedule Property, the plaintiffs have not filed any reply statement, by denying the same that the settlement deed



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was obtained by fraud and undue influence. When there was no specific denial or allegation of undue influence or fraud, the finding of the trial Court that the second defendant had not discharged his burden by proving that the transaction was perfectly fair and reasonable is untenable. Further, the trial Court rejected the said contention of the appellant/second defendant on the ground that the said transaction was not reflected in the Encumbrance Certificate, Ex.A-11, produced by the respondents/plaintiffs. In the considered opinion of this Court, the said finding of the trial Court cannot be sustained, for the reason that the said transaction was clearly effected and reflected in Ex.B-10, produced by the appellant/second defendant, and the said document was simply ignored by the trial Court, in spite of the same having been brought to its notice. Hence, the Judgment and decree of the trial Court with regard to the 'B' Schedule property is also liable to be set aside.

23. Since it is decided that the decree of the trial Court is liable to be set aside, the claim of the respondents/plaintiffs in the suit with regard to mesne profits in respect of the rental collections alleged to have been made by the appellant/defendants 1 and 2 from the tenants occupying Plaintiff 'A' and 'B' Schedule properties from 01.01.2008 does not arise.

24. For the foregoing reasons, this Appeal Suit succeeds and it is, accordingly, allowed, setting aside the judgment and decree, dated 17.12.2009, passed in O.S.No.2750 of 2008 by the VII Additional Judge, City Civil Court, Chennai. No costs. Consequently, the connected M.P.No.1 of 2011 is closed.

Sd/-
Assistant Registrar

// True Copy //

Sub Assistant Registrar

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To

1.VII Additional Judge,
City Civil Court,
Chennai.

2.The Section Officer,
V.R.Section,
High Court, Madras.

+lcc to Mr.T.Srinivasaraghavan, Advocate Sr.No.24393

A.S.No.312 of 2011

EV(CO)

RVM(06/06/2022)