R. Kumarasamy Kounder Vs V. Ezhumalai Kounder

Court: Madras High Court

Date of Decision: Jan. 10, 1996

Acts Referred: Evidence Act, 1872 â€" Section 3, 68
Transfer of Property Act, 1882 â€" Section 122

Citation: (1996) 2 CTC 150

Hon'ble Judges: S.S. Subramani, J

Bench: Single Bench

Advocate: A. Sivaji, for the Appellant; A. Thamizharasan, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

S.S. Subramani, J.
This second appeal is filed by the plaintiff in O.S. No. 54 of 1991, on the file of Additional District Munsif s Court,

Villupuram.

2. The suit filed by the appellant is one for declaration of title and recovery of possession on the following facts:-

The property having an area of 80 cents originally belonged to one Govindasamy Gounder who sold the same to one Pandurangan as per Ex. B. l.

Pandurangan had two sons. It is said that on the death of the wife of Pandurangan, these children, who were then minors, were left in the custody

of their uncle Natesan. At that time, Pandurangan executed the original of Ex.A.4 settlement deed dated 15.12.1986. The original of the document

is marked as Ex.B.15 on the side of the defendant. It is averred that as per the settlement deed, the minors became the absolute owners of the

property who were then under the protection of their uncle Natesan. Pandurangan was a permanent employee at Madras. On 21.6.1989,

Pandurangan executed a cancellation of the settlement as evidenced by Ex. B.3 and thereafter he sold 3 cents of land under Ex.B.2 and a lease for

a period of ten years as per Ex. B.4 in favour of the defendant. On the minor sons, the elder one became major and executed a sale deed in favour

of the plaintiff as per Ex. A.l. It is averred that the defendant trespassed into the property on the basis of the sale and lease deed executed by

Pandurangan. The suit is, therefore, filed on the basis of Ex. A.1, claiming title over the property and also for recovery of the same.

3. In the written statement filed by the defendant, it is alleged that Pandurangan did execute a settlement deed, but the same was not executed on

his own will and pleasure, but Natesan got it executed by exercising undue influence and took the alleged settlement deed with him. It is also said

that the settlement deed is not valid since Natesan cannot act as guardian while the natural guardians of the minors arc alive. After knowing the

invalidity of the document which, according to the defendant, did not come into effect, Pandurangan cancelled the same by way of abundant

caution and thereafter executed a document in his favour as evidenced by Ex.B.2 and B.4. It is said that the plaintiff has no title over the property

and the suit is bad for non-joinder of necessary parties. Defendant wanted the suit to be dismissed with costs.

4. During trial, Ex. A.1 to A.6 were marked on the side of the plaintiff and P.Ws. 1 and 2 were examined. P.W.I is the plaintiff and P.W.2 is an

independent witness. On the side of the defendant, the defendant got himself examined as D.W.I and the plaintiff''s vendor and the elder son of

Pandurangan was examined as D.W.2 and Pandurangan himself deposed as D.W.3.

5. On the basis of the above evidence, the trial Court came to the conclusion that the settlement deed is valid. It was duly accepted by the donees

and the revocation deed as evidenced by Ex.B.3 is invalid. The title in favour of the plaintiff was also declared on the basis of Ex. A. l. When the

suit was decreed allowing the plaintiff to recover the property from the defendant, regarding mesne profits, necessary direction was given to

ascertain the same in execution under Order 20, Rule 12, C.P.C.

6. The defendant took the matter in appeal as A.S. No. 24 of 1993, on the file of the Subordinate Judge''s Court, Villupuram. The Lower

Appellate Court reversed the judgment of the trial Court and held that Ex.A.4 or Ex. B.15 was not properly proved and also held that it has not

come into effect. The lower Appellate Court even doubted the genuineness of Ex.B.15. It also said that possession might not have passed to the

donees since Pandurangan was in possession to entrust the property to the defendant as evidenced from Ex. B. 2 and B.4. Since the cancellation

has been effected, the Lower Appellate Court said that the sale in favour of the plaintiff is invalid. Allowing the appeal, the suit was dismissed. It is

against the said decision, plaintiff has preferred this second appeal.

7. When the Second appeal came for admission, notice of motion was ordered and no receipt of notice, respondent entered appearance.

8. In the memorandum of appeal, the following questions of law have been raised:-

1. Whether the Lower Appellate Court is justified in dismissing the suit on the facts and circumstances of the case?

2. Has not the Lower Appellate Court committed grave illegality in holding that the settlement deed under Ex.B.15 was not executed by D.W.3,

not acted upon and validly cancelled under Ex.B.3 when Ex.B.15 is an irrevocable settlement deed, acted upon and when D.W.3 admits the

execution of Ex.B.15 in Ex.B.3?

3. Is it necessary to prove the execution of the settlement deed under Sections 68 and 70 of Evidence Act when its execution was not only

admitted under Ex.B.3 but there is no specific denial of execution?

4. Is the Lower Appellate Court justified in reversing the well considered judgment and decree of the trial court when there is no sufficient pleading

with regard to the undue influence, coercion and misrepresentation?

5. Can the Lower Appellate Court dispose of the appeal without framing the proper and relevant points for determination as required under Or.

41, Rule 31, C.P.C?

6. Is the Lower Appellate Court right in dismissing the suit when the sale in favour of the plaintiff is valid and while the revocation of the settlement

is invalid and

7. Is not the finding of the Lower Appellate Court vitiated due to non-application of the law?

9. According to me, for proper disposal of this second appeal, Question Nos. 1 to 4 alone are sufficient and they van also be considered together.

10. The main question that has to be considered in this appeal is, whether Ex.A.4 or Ex.B.5 was accepted by the donees and whether the

cancellation deed evidenced by Ex.B.3 has any legal force.

11. The circumstances under which Ex.A.4 or Ex. B. 15 was executed, arc recited in the document itself. Those circumstances arc not disputed

even by D.W.3 when he was examined. At the time when Ex.A.4 was executed, Pandurangan''s sons were minors, aged 14 and 9. At that time,

Pandurangan was residing in Madras and the children were away from him. Naturally, some provision had to be made for their maintenance and

some person had to be chosen with whom their welfare can be entrusted. Natesan, a close relation of D.W.3, was entrusted with the matter of

looking after the welfare of the minors and he was also declared as the local guardian of the minors. A reading of the document shows that at the

time when it was executed, the minor''s mother was no more and there was nobody to look after them. He wanted the local guardian to lookafter

the affairs and he also wanted Natesan to cultivate the lands and to maintain the children out of the income derived therefrom. It is also said that if

there was any surplus income, the same was also to be saved and accounted. In this connection, it is also to be remembered that Pandurangan,

though was at Madras, was not educated and he was only a Cooly. So, to send the minors a separate maintenance was an impossibility so for as

he was concerned. In the above background, after having executed the deed, he further declared that he has no power to cancel or revoke the

same and the property covered by the settlement has also been handed over to the donees through Natesan.

12. We find that the document might have been executed only after consultation with Natesan, for, he was appointed as the local guardian. Stamp

papers for a value of Rs. 120 were also purchased in the name of Natesan. The total value of the property was Rs. 32,000 and the stamp papers

purchased became insufficient. While the document was presented for registration, the deficiency was found out and Natesan was asked to pay an

amount of Rs. 860 more. It was after realising a sum of Rs. 860 from Natesan, the document was registered by the Sub Registrar. It was

presented before the Sub Registrar by D.W.3 on the same date.

13. A reading of Ex.A.4 will show that it is a simple gift without any obligation and the donees are not made liable for liability. It is not onerous.

14. Nearly 2 l/2 years after Ex.B.3 was executed wherein the donor admitted that he had executed such a document, in that document, he did not

say the circumstances under which Ex.B.4 was executed were false, but he said that the property continued in his possession and that tax is also

being paid by him. Under the above circumstances, he wanted the document to be cancelled. Stating the above reason, he said that Ex.B.15

stands cancelled. Ex. A. 4 is the registration copy of the document produced on the side of the plaintiff and Ex.B.15 is the original produced on the

side of the defendant. On the basis of Ex.A.4 and Ex.B.3, we have to consider whether the settlement deed or gift was executed by the donees.

15. Section 122 of the Transfer of Property Act defines a gift and says that it must be accepted by and on behalf of the donee. It also says that that

acceptance must be made during the lifetime of the donor and while he is capable of giving. If the donee dies before acceptance, the gift is void. I

have already said that Ex.A.4 is not onerous and it is a simple gift. I have also narrated the circumstances under which the document was executed,

the circumstances which are not disputed by any one. Of course, a case of undue influence and fraud is alleged. But it is not substantiated by any

evidence. Moreover, there cannot be any fraud or undue influence since Ex B.3 does not say so. I have said that a gift will have to be accepted. In

this case, the donees are minors. Even though they are incompetent to contract, they are capable of accepting a gift since it is only for their benefit.

In this case, the acceptance is not by the donees themselves, but through their local guardian Natesan. The acceptance need not be direct, for, it

may be on behalf of the donee.

16. Since it is not an onerous gift, a very slight evidence is sufficient to prove acceptance. The circumstances themselves may speak of acceptance.

Normally when a person gifts a property to another and it is not an onerous gift, one may expect the other to accept such gift when once it comes

to his knowledge, since normally any person would be willing to promote his own interest. May be in particular cases, there would be peculiar

circumstances which may show that the donee would not have accepted the gift. But they are rather an exception to the rule. It is only normal to

assume that the donee would have accepted the gift. Mere silence may be indicative of acceptance, provided it is shown that the donee knew

about the gift. For proving acceptance, there need not be any direct evidence. It can be express or implied. It can also be inferred from the facts

and surrounding circumstances attending the transaction of gift. An acceptance can also be had before the registration of the document It can be

properly registered if it is accepted by the donee or on his behalf.

17. In Chennupati Venkatasubbamma Vs. Nelluri Narayanaswami, , a learned single Judge of this Court has held thus:-

If there is acceptance of the gift after execution of the deed, even though the registration was postponed to a later date, the gift would become

irrevocable. The fact that the deed was executed and registered would not make it irrevocable, if in fact there was no acceptance by the donee,

either before registration but after execution or even after registration. What the law requires is acceptance of the gift after its execution though the

deed may not be registered. Anterior negotiations or talks about the transfer of property by way of gift would not amount to acceptance of the

transfer of the property by gift. Acceptance may be implied but the facts relied on to draw an inference of acceptance must be acts of positive

conduct on the part of the donee or persons acting on his behalf and not merely passive acquiescence, such as standing by when the deed was

executed or was registered..

18. I have already stated that the stamp papers were purchased in the name of the local guardian Natesan and after the completion of the

document, when the same was about to be registered, it was found out that it was insufficiently stamped. The deficient stamp duty was paid by

Natesan which according to me is sufficient to prove the acceptance. For, if he was not accepting the document, there was no necessity for him to

pay the stamp duty. The endorsement in Ex.A.4 makes it clear. A declaration by the donor that he has ceased to be the owner of the property and

has handed over the entire property to the donee also is of importance. A further declaration that he has no right to cancel the same also cannot be

lost sight of. Along with the same, the evidence of D.W.I also will have to be considered. In the last portion of the cross-examination, he said that

before institution of the suit Ex.A.2 notice was issued and that a reply was sent as per Ex. A3. He also said that the sons of Pandurangan have

effected mutation and patta stands in their name. He has also said that before his sale deed, both the sons were in possession of the property and

thereafter the plaintiff was also in possession. The possession of D.W.2 and his brother Pasu can only be on the basis of the gift and possession of

the plaintiff can also be only on the basis of Ex. A.1. When the patta stands in the name of the sons, that also shows that the gift was accepted by

them or on their behalf by Natesan.

19. Certain circumstances have been alleged to show that the gift might not have been accepted. One of the reasons mentioned is that the original

deed is produced by the defendant and not by the plaintiff. According to me, that is not a circumstance which goes against the case. If we go by

the written statement of the defendant, that will show that the original deed was in the hands of Natesan. In paragraph 2 of the written statement, it

is said:

by exercising under influence took the alleged settlement deed .....

The production of the original, namely Ex.B.15, by the defendant also may not have any importance, D.W.2, the vendor is now on the side of the

defendant. He has spoken on his behalf. There is no recital in Ex. A. 1 that the originals have been handed over. It has also come out from the

evidence of D.W.2 that the father and children are now residing together. If a document comes into existence under the above circumstances and

is produced on the side of the defendant, that cannot be made use of against the plaintiff, especially when D.W.2 has ceased to have any interest

over the property.

20. The Lower Appellate Court has given some reasons for discarding Ex. A. 4 which according to me is because of misunderstanding of facts,

and this has resulted in grave injustice. Nobody has a case that Ex.A.4 was not written and executed by Pandurangan. If only the lower appellate

Court had considered Ex.B.3 wherein he had unequivocally admitted the execution of Ex.A,4, the lower appellate court could not have entered a

finding that Ex.A.4 is not properly proved. The Lower Appellate Court also considered the signature appearing in Ex.B.15 and other documents

executed by Pandurangan. Thereafter that Court enters a finding that Ex.B.15 might not have been executed by Pandurangan. I feel that the Lower

Appellate Court has not even read the written statement filed by the defendant. The lower Appellate Court has also found exception for not

examining the attestors to Ex.B.15. If only the lower appellate Court had read Section 68 of the Evidence Act, such a finding would not have been

entered. A document which requires attestation can be admitted in evidence after the examination of the attestor, only if the execution is specifically

denied. In the written statement as well as in Ex.B.3, the execution of Ex.A.4 is specifically admitted. An admitted document need not be proved.

The Lower Appellate Court has not read Section 58 of the Evidence Act.

21. The Lower Appellate Court has also failed to consider the admission of D.W.I regarding possession. While discarding the evidence of the

plaintiff, the lower appellate Court has said that since Pandurangan was in a position to give possession to the defendant on the basis of Ex.B.2 and

B.4, possession might have been retained by Pandurangan. The said inference is also not correct. The Lower Appellate Court has not considered

the strained relationship between Natcsan, the plaintiffs vendor and also Pandurangan. Natesan is not in good terms with the plaintiffs Vendor and

the vendors are now with B.W.3. Under the above circumstances, if possession could be handed over by Pandurangan to the defendant, that is

not on the basis of an anterior possession de hors the gift, but on the basis of some arrangement with the plaintiffs vendors and Pandurangan. In this

connection, it is also worthwhile to note that the specific case of the plaintiff is that the defendant trespassed into the property after he took the

document from Pandurangan. The said possession cannot be an answer against the plaintiffs right, nor can it be considered as a circumstance to

show that the settlement deed was not accepted. Once I hold that the gift is accepted, D.W.3 ceases to have any right over the property. The gift

once accepted by and on behalf of the donees, cannot thereafter be revoked under any circumstances.

22. In this connection, it may also be noted that Pandurangan is a natural guardian of his minor sons and stands in a fiduciary capacity. Being a

trustee for the minors, he cannot act against their interest and cancel the gift deed executed by him.

23. In Atmaram Sakharam Kalkye v. Vaman Janardhan Kashelikar, ILR 49 Bom 388, a Full Bench of the Bombay High Court held thus:-

Where the donor of immovable property has handed over to the donee an instrument of gift duly executed and attested, and the gift has been

accepted by the donee, the donor has no power to revoke the gift.

The same was follows by the Kerala High Court in the decision reported in Kelan v. Govindan, 1969 K.L.T 415.

24. Once it is held that there is a valid gift and Ex.B.3 is invalid, the defendant"s possession of the property on the basis of Ex.B.2 and B.4 is void.

Those documents were executed by Pandurangan as if he alone is the absolute owner of the property. Since the documents are invalid, possession

of the defendant can only be treated as that of a trespasser.

25. Plaintiff claims title on the basis of Ex. A. l. The same is executed by the elder son of Pandurangan, namely, Arunagiri for himself and also on

behalf of his younger brother Rasu (minor son of Pandurangan). So far as the share of Arunagiri is concerned, there cannot be any dispute. A valid

title passes to the plaintiff on the basis of Ex. A. l. But, what is the right of Arunagiri (D.W.2) to represent his younger brother while executing the

sale deed. To that extent, it cannot be said that the plaintiff has obtained a valid title. But that cannot stand in the way of the plaintiff getting

recovery of the property from the defendant. Plaintiff can be treated as a co-owner. A co-owner is entitled to file a suit for recovery of property

against the trespasser. Since I have held that the possession of the defendant can only be that of a trespasser, the plaintiff is entitled to get a decree.

In view of the said findings, I answer the substantial questions of law as follows:-

25.A. I hold that the lower appellate court was not justified in dismissing the suit, and I further hold that the lower appellate Court has committed a

grave illegality holding that the settlement deed Ex.B.15 was not executed by D.W.3. Nobody has such a case. The Lower Appellate Court also

went wrong in holding that Ex.B.15 requires proper proof of its execution under Sections 68 and 70 of the Evidence Act. I hold that since the

execution of the document is admitted, no farther proof is required. I also hold that there is no evidence regarding undue influence, coercion or

misrepresentation as alleged in the written statement. No details are given regarding the same and the evidence is also totally lacking.

26. In the result, I hold that the judgment of the Lower Appellate Court is perverse and the same is against the admitted case of the parties and it is

liable to be set aside and I do so accordingly. The second appeal is allowed. A decree is granted in favour of the plaintiff allowing to recover the

plaint property with mesne profits from the defendant. The quantum of profits will be decided in execution under Order 20, Rule 12, C.P.C. The

appellant is also entitled to his costs in this second appeal.