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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Orders reserved on : 24.07.2015

Orders delivered on : 14.10.2015

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A(MD) No.484 of 2015

and

M.P(MD)No.2 of 2015

1.B.Lakshmi

2.R.Suseela

.. Appellants/3rd Parties

Vs.

1.Minor B.Keerthanarani

2.Minor.B.Dhivakar

Rep by their mother and
natural guardian Amutha,
W/o.Late.Bagavathimuthu.

..Respondents 1 and 2/Petitioners

3.R.Arumugam

..3rd Respondent/Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 47 of the Guardians and Wards Act, 1890 to call for the records relating to the Fair and Decreetal order, dated 16.12.2013 made in G.W.O.P.No.39 of 2012, on the file of the Principal District Court, Theni and set aside the same and allow this appeal.

For Appellant	: Mr.M.Kannan
For R1 & R2	: Mr.R.Suriya Narayanan
For R3	: Mr.B.Jeyakumar

O R D E R

The appellant has filed this appeal to set aside the order, dated 16.12.2013 made in G.W.O.P.No.39 of 2012, on the file of the Principal District Court, Theni and allow the appeal with costs.

2.The appellants are third parties in GWOP No.39 of 2012, on the file of the Principal District Court, Theni. The said GWOP was filed by the respondents 1 and 2 through their mother and natural guardian B.Amutha, W/o.Late.Bagavathi Muthu. The respondents 1 and 2 are daughter and son of B.Amutha and one Bagavathi Muthu, who is brother of appellants and third respondent. The respondents 1 and 2 filed GWOP through their mother B.Amutha for appointing her as guardian of minors and for permission to sell the minors' 2/3 share in the properties mentioned in the schedule. The third respondent alone was impleaded as sole respondent in GWOP. The said GWOP was ordered on 16.12.2013 based on the compromise entered into between the mother of the respondents 1 and 2 and third respondent.



3. According to the appellants, they are aggrieved by the order granting permission to sell the property. Therefore, they filed M.P.No.1 of 2014 for leave to file CMA against the order, dated 16.12.2013 made in GWOP No.39 of 2012, on the file of the Principal District Court, Theni. This Court, by the order, dated 03.03.2015 granted leave to file CMA. Based on the same, the present appeal is filed by the appellants.

4. Facts of the case:-

The respondents 1 and 2 are minor daughter and son of one Bagavathi Muthu and B.Amutha. The properties mentioned in GWOP belonged absolutely to their grand mother Petchiammal. The said Petchiammal by gift settlement, dated 29.12.2000 bearing document No.1369/2001 gifted the property to respondents 1 and 3. In the settlement deed, it has been mentioned that any male or female child born through Bagavathimuthu will also be entitled to a share in the property. After gift settlement deed, the second respondent was born. Bagavathymuthu died intestate on 03.05.2010. Therefore, the respondents 1 to 3 have equal share in the property. While so, the third respondent was claiming to be absolute owner of entire property in exclusion of respondents 1 and 2. Therefore, GWOP was filed against the third respondent for the relief referred to above.

5. The third respondent entered appearance and opposed the same. The case was referred to mediation centre in M.F.No.128/13, dated 13.12.2013. The matter was settled and settlement memo was filed. The Court recorded the same and the order was passed on 16.12.2013 appointing B.Amutha, W/o.Bagavathi Muthu, mother of respondents 1 and 2, as guardian of respondents 1 and 2 and permitted her to sell the properties mentioned in the schedule as per the agreement of sale and directed her to deposit a sum of Rs.25,00,000/- each in the names of respondents 1 and 2 in any one of the Nationalised Bank and to file Xerox copies of the said receipts into Court.

6. Against the said order, the appellants have filed the present appeal.

7. The learned counsel for the appellants contended that they have filed O.S.No.150 of 2001 on the file of Sub Court, Periyakulam for partition against Bagavathimuthu, the father of respondents 1 and 2 and third respondent and their mother Petchiammal and two others including the properties mentioned in the GWOP. A preliminary decree was passed on 6.11.2003. Subsequently, the said suit was transferred to Sub Court, Theni and re-numbered as O.S.No.11 of 2008. The said Bagavathimuthu younger brother of appellants died on 3.5.2010. His wife B.Amutha and respondents 1 and 2 were impleaded as parties in final decree proceedings. While so, the respondents 1 and 2 have filed GWOP No.39 of 2012 against third respondent suppressing the pendency of the suit and without impleading appellants as parties and in collusion with third respondent, obtained orders. As per the order, the said B.Amutha, the mother of the respondents 1 and 2 was permitted to sell the property to one P.Sundaram fourth defendant in the suit. The learned counsel for the appellants contended that there



is no necessity to appoint any guardian to the minors when they were about to attain majority. According to appellants, the respondents 1 and 2 are minors and they are only studying in school and there is no necessity to sell the property and to deposit Rs.25,00,000/- in the names of respondents 1 and 2.

8.The guardian appointed, colluded with proposed purchaser and sold the property for a lower price. The respondents 1 to 3 colluded with each other and got Amutha mother of minors appointed as guardian and obtained orders to sell the properties.

9.The learned counsel for the appellant relied on the judgement reported in **2010(8) SCC 383 (Meghmala and others vs. G.Narasimha Reddy and others)** the relevant portion of the judgment is extracted hereunder:-

"36. From the above, it is evident that even in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality the questions of non-executing of the statutory remedies or statutory bars like doctrine of res judicata are not attracted. Suppression of any material fact/document amounts to a fraud on the Court. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is non est."

10. per contra, the learned counsel appearing for the respondents submitted that the appellants filed O.S.No.150 of 2001 and pending suit, they instigated their mother Petchiammal to cancel the gift deed executed in favour of the respondents. The said Petchiammal cancelled gift deed by a deed on 06.02.2002. Subsequently, on 26.04.2002 she cancelled the cancellation of gift deed, dated 06.02.2002. Further, Petchiammal relinquished her 1/5 share in other family property, which are subject matter in O.S.No.150 of 2011 by the deed, dated 12.06.2002 in favour of third respondent and Bagavathimuthu.

11.The Second appellant also compromised the matter with third respondent and BagavathiMuthu and by the deed, dated 20.06.2002 relinquished her 1/5 share in the suit property in O.S.No.150 of 2001 in favour of her brothers third respondent and Bagavathimuthu. She received consideration for the same on 21.06.2002 and issued a receipt.

12.First appellant also decided to settle the matter and gave assurance to her brothers third respondent and Bagavathymuthu that she would not pursue with the suit. Contrary to the said assurance and suppressing the release deed executed by Petchiammal and second appellant, the appellants obtained an ex-parte preliminary decree on 6.11.2003. The same is vitiated because of fraud and suppression of material fact and therefore, preliminary decree cannot be enforced and it is not binding on the respondents. The first appellant alone filed I.A.No.305 of 2006 for passing final decree. The second



appellant was shown as sixth respondent. Again a compromise was arrived at between Bagavathy muthu, third respondent and first appellant. In view of the said compromise and by registered release deed dated 03.08.2007 the first appellant relinquished her share in the entire suit property mentioned in O.S.No.150 of 2001. The said Bagavathymuthu, the father of respondents 1 and 2 sold other properties to meet heavy demand made by the first appellant. On such compromise, the application for final decree was dismissed on 15.09.2008 for non-prosecution. When respondents 1 and 2 filed GWOP No.39 of 2012 no final decree application was pending. As per the permission granted by the learned Principal District Judge, Theni, the respondents 1 and 2 through their guardian sold the property and deposited the amounts in the names of respondents 1 and 2. Subsequently, appellants have filed **(*) I.A.No.68 of 2014** for passing of final decree to extract more money from the respondents 1 and 2 through their mother B.Amutha. The learned Principal District Judge, Theni referred the GWOP No.39 of 2012 to Mediation and after negotiation, compromise was arrived at between the respondents. Compromise memo was submitted before the learned Principal District Judge, Theni, who considering all the materials and compromise memo, appointed B.Amutha mother of respondents 1 and 2 as their guardian and permitted her to sell the property. The said order was passed taking into consideration the interest of minors. The appellants have no locus-standi to challenge the order impugned in GWOP as they have already relinquished their rights in the suit property and therefore, prayed for dismissal of the CMA.

13. The learned counsel for the respondents relied on the judgment reported in **1994 (1) SCC 1 (S.P.Chengalvaraya Naidu (dead) By Lrs. v. Jagannath (dead) by Lrs. And others)** the relevant portion of the order is extracted hereunder:-

"6. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the Court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the Court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Ex.B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the Court. We do not agree with the observations of the High Court that the appellants-defendants easily produced the certified registered copy of Ex.B-15 and non-suited the plaintiff. A litigant, who approaches the Court, is bound to produce all the documents



executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

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14. I have carefully perused the available materials on record and considered the arguments of the learned counsel for the appellants and respondents and judgments relied on by them.

15. The point for consideration in the appeal is whether the order of learned Principal District Judge, Theni permitting B. Amutha as guardian of respondents 1 and 2 to sell the properties, which are subject matter of the suit for partition.

16. The appellants are challenging the order of the Principal District Judge, appointing B. Amutha mother of respondents 1 and 2 as guardian of minors 1 & 2 and permission granted to sell the properties is valid and legal.

17. From the materials, it is seen that the appellants have filed suit for partition of the properties and a preliminary decree has also been passed. The application filed for passing final decree was dismissed for non-prosecution. Subsequently, the appellants have filed another application for passing a final decree and the same is pending. The respondents 1 and 2 alleged that appellants relinquished their share in the family properties which are subject matter of suit. According to B. Amutha guardian of respondents 1 and 2, they released their share and appellants received huge amounts. These facts were not mentioned in the GWOP filed by respondents 1 and 2. The appellants contended that they relinquished their share by misrepresentation by Bagavathimuthu and third respondent.

18. The judgments relied on by both the counsel for the appellant and respondents relate to fraud being committed on Court. Both are alleging that other party has played fraud on the Court in obtaining orders in their favour. This issue whether appellants or respondents played fraud on the Court can be decided only in the final decree application, which is pending before the competent Court by letting in oral evidence if parties so desire. The right of appellants and respondents can be decided only based on the finding as who had played fraud on the Court or who had suppressed the material fact and obtained the orders.

19. In view of pendency of suit, the order of learned Principal District Judge permitting Amutha guardian of respondents 1 and 2 to sell the properties is set aside in so far as the properties which are subject matter of the suit. Any sale already made will be subject to result in **(*) I.A.No. 68 of 2014** filed for passing of final decree. The order of learned Principal District Judge appointing B. Amutha mother as guardian of respondents 1 and 2 is confirmed. The order granting permission to sell the properties which are subject matter of the suit alone is set aside.



20. In the result, the Civil Miscellaneous Appeal is partly allowed. It is open to the parties to raise all their objections available to them as per law in the final decree application.

Sd/-

Assistant Registrar (C.O.)

/True Copy/

**(*)Corrected as per order dated.17.12.2015
and made in CMA.484/2015.**

Sub Assistant Registrar (CS)

To

(*)To be substituted order already despatched.

The Principal District Judge, Theni.

+1cc to Mr.M.Kannan, Advocate Sr.No.61095

+1cc to Mr.R.Suriyanarayanan, Advocate Sr.No.61468

akm/03.11.2015 /6p-4c/

C.M.A (MD) No.484 of 2015
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PBK/SK-SKN/SAR-I 17/12/2015 ::6P-4C:: (IT)