

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.11.2016

PRONOUNCED ON : 23 .11.2016

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.3 of 2011

and

M.P.No.1 of 2011

M.Panneerselvam

...
Vs.

Appellant

- 1.Susseela
- 2.Raja Sekar
- 3.Dinesh Kumar

(RR1 to 3 and are recorded
as Lrs of the deceased 4th
respondent vide order
of the Court dated 2/11/2016
made in memo in S.A.3/2011.)

4. Elumalai (deceased)
5. Rajakumari
6. C.R.Dhakashnamoorthy (deceased)

(Memo recorded as per order of
this Court dated 2/11/2016 in
S.A.No.3 of 2011)

7. The Thasildhar, Tiruttani
Tiruttani Town, Tiruvellore District....

Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 27.10.2010 made in A.S.No.7 of 2006 on the file of the Sub Judge, Tiruvellore in confirming the judgment and decree dated 29.07.2005 made in O.S.No.158 of 1992 on the file of the District Munsif Court at Tiruttani.

For Appellant : Mr.Y.Jyothish Chander

For Respondents : Mr. M.s.Krishnan
No. 1 to 3 Senior Counsel
for M/s.Sarvabhoulman Associates

For Respondents
No. 5 and 7 : No appearance

JUDGMENT

Challenge in this second appeal is made by the first defendant against the judgement and decree dated 27.10.2010 made in A.S.No.7 of 2006 on the file of the Subordinate Court, Thiruvellore, confirming the judgement and decree dated 29.07.2005 made in O.S.No.158 of 1992 on the file of the District Munsif Court, Thiruttani.

2. The suit has been laid for declaration and permanent injunction.

3. The case of the plaintiffs, in brief, is as follows:

The defendants 2 and 3 are the father and mother of the plaintiffs 1 to 3. The 4th defendant is the brother of the second defendant. The plaintiffs 1 to 3 are minors and are represented by their paternal aunt R.Gethari, who is the sister of the defendants 2 & 4.

The suit property and other properties originally belonged to Kamakshiammal wife of C.V.Rajamanickam Mudaliar of Kalambakkam village. Kamakshiammal executed a registered Will dated 13.02.1976 bequeathing life interest in the suit property to the second defendant together with a vacant site therein. Under the above said Will, the second defendant has got only life interest in the suit property and the vested remainder belongs to the plaintiffs. The second defendant has no right to alienate or encumber the suit property. Kamakshiammal died on 30.04.1977 and after her death, the Will dated 13.02.1976 came into effect. For the past five years, the second defendant and his wife, the third defendant started exhibiting hostile attitude towards the interest of the plaintiffs and the plaintiffs are under the care and protection of their paternal aunt R.Gethari alias Gouri. The defendants 2 and 3 seem to have sold the suit property to the 4th defendant under document No.1219/1987 dated 27.08.1997 and in turn, the 4th defendant sold the suit property to the first defendant under a registered document No.300/1988 dated 09.03.1988. The second defendant has no right to execute such sale deed dated 27.08.1987. So, the sale deeds dated 27.08.1987 and 09.03.1988 are not valid in law and they are not binding on the plaintiffs. The plaintiffs issued a lawyer's notice dated 18.03.1991 to the defendants 1, 2 and 4 and the

defendants have not responded to the same. The first defendant has made an application to the 5th defendant for transfer of patta and the plaintiffs gave notice to the 5th defendant under Section 80 CPC asking him not to transfer patta in favour of the first defendant. Hence, the suit.

4. The case of the first defendant, in brief, is as follows:

The suit is not maintainable either in law or on facts. The suit laid by R.Gethari alias Gouri as next friend is not maintainable, since the father and mother of the plaintiffs are alive and they are under the care and protection of their parents. It is true that the properties originally belonged to Kamakshiammal and she has executed a Will dated 13.02.1976. It is false to state that the second defendant was given only life interest in the suit property with a vacant site and that, the vested remainder has been given to the plaintiffs and that, the second defendant has no right to alienate or encumber the suit property. It is false to state that for the past five years, the defendants 2 and 3 have been exhibiting hostile attitude towards the interest of the plaintiffs and that, the plaintiffs are under the care and protection of their paternal aunt R.Gethari alias Gouri. The plaintiffs

are under the care and protection of the defendants 2 & 3 and the suit has been laid at the instigation of the defendants 2 & 3. The second defendant has got absolute right with powers of alienation under the Will dated 13.02.1976 and the plaintiffs cannot question the alienation of the suit property by the second defendant. It is false to state that the defendants 2 & 3 have no right to execute the sale deed and the same is not binding on the plaintiffs. The second defendant has got absolute right over the suit property and he had sold the same to the fourth defendant and in turn, the 4th defendant had sold to the same to the first defendant. Since the date of sale, the first defendant is in exclusive possession and enjoyment of the suit property. To the notice sent by the plaintiffs, the first defendant gave a reply. The second defendant has sold the suit property for the family benefit and necessity. The plaintiffs have no right to question the same. The plaintiffs have no right to ask for the relief of declaration. There is no cause of action for the suit and hence, the suit is liable to be dismissed.

5. In support of the plaintiffs' case, PWs 1 to 4 were examined and Exs.A1 to 8 were marked. On the side of the defendants, DWs1 to 3 were examined and Exs.B1 to 12 were marked.

6. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to decree the suit as prayed for. The first defendant preferred the first appeal and the first appellate court also confirmed the judgment and decree of the trial Court and dismissed the first appeal. Challenging the same, the second appeal has been preferred.

7. The second appeal was admitted and the following substantial questions of law are formulated for consideration in the second appeal.

(a) Whether the courts below were right in not considering the suit valued under Section 25 (d) of the Tamil Nadu Court Fees and Suit Valuation Act 1958 is correct and proper?

(b) Whether the suit prayer for declaration is barred by limitation?

8. The main issue, that is, involved in this second appeal is whether the second defendant Elumalai has got absolute right over the suit property under the Will dated 13.02.1976 executed by his mother Kamakshiammal or Whether the second defendant has been conferred

only life interest under the said Will, in respect of the suit property and the vested remainder belongs to the plaintiffs. Barelessly claiming absolute right over the suit property under the above said Will, the second defendant, according to the plaintiffs, had alienated the suit property in favour of the 4th defendant under the registered sale deed dated 27.08.1987 and in turn, the 4th defendant sold the same to the first defendant under the registered sale deed dated 09.03.1988. According to the plaintiffs, the above said sale deeds are not valid in law and therefore, they have come forward with the suit for the relief of declaration and permanent injunction. The relief of declaration is that the sale deed dated 27.08.1987 under Document No.1219/87 in favour of the 4th defendant and the sale deed dated 09.03.1988 under document No.300/88 in favour of the first defendant are null and void and they are not binding on the plaintiffs. The plaintiffs have valued the suit for the purpose of Court fee and jurisdiction at a sum of Rs.400/- and paid the Court fee of Rs.30.50 under Section 25(d) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955, (herein after referred to as Act) as per the memo of valuation.

9. No doubt, the first defendant has not taken a plea in the written statement qua the valuation of the relief sought for by the

plaintiffs and therefore, the said issue did not come for consideration before the trial court. However, it has been admitted that the first defendant in the first appellate Court has taken a ground in the memorandum of grounds of appeal that the trial Court erred in decreeing the suit holding that the alienation by the father Elumalai and the plaintiffs is invalid and according to the first defendant, the Court fees paid is not correct and in fact, the minor plaintiffs were nominee parties to the sale deed in favour of C.R.Dhakashnamoorthy viz. the 4th defendant and as such, the sale deed should be set aside and the Court fee is liable to be paid under Section 40 of the Act and hence, the suit should have been dismissed. The first appellate court, however, has not accepted the above plea taken by the first defendant in the first appeal and as found earlier confirmed the judgement and decree of the trial Court as regards the relief granted to the plaintiffs.

10. In the second appeal, as regards the question qua the nature of the right over the suit property that the second defendant had derived under the Will dated 13.02.1976 was not focused by the counsel for the appellant. In fact, no argument was put forth on the above issue.

11. However, the counsel for the appellant focused that the plaintiffs have not properly valued the Court fees and according to him, the plaintiffs being eo-nominee parties to the sale deed dated 27.08.1987 executed in favour of the C.R.Dhakashnamoorthy by the second defendant, the plaintiffs should have asked for the relief for cancellation of the sale deed and valued the suit under Section 40 of the Act and paid the due Court Fees and the plaintiffs having not done so, the suit is liable to be dismissed. Further, according to the counsel for the appellant, the suit is barred by limitation.

12. The above questions of law were formulated at the time of admission of the second appeal for consideration.

13. That the plaintiffs are eo-nominee parties to the sale transaction dated 27.08.1987 is not in dispute. A Perusal of the said sale deed marked as Ex.A8 would go to show that the plaintiffs are eo-nominee parties to the said sale transaction. Therefore, without adverting to much on the said issue i.e. whether Ex.A8 is required to be cancelled as claimed by the appellants, a useful reference may be made to the decision relied upon by the counsel for the appellant

reported in **1996 (1) CTC 661 (P.B.Ramjee and two others V. P.B.Lakshmanaswamy Naidu & ten others)**. Therein, it has been held that where minor is eo-nominee party to the sale deed or other document executed by father, suit for cancellation of such document should be sought for and the suit should be valued under Section 40 of the Act. While taking the above said view, the Division Bench followed the Full Bench judgment of the Madras High Court reported in **AIR 1956 Madras 670** and has also, extracted the points adjudicated by the Full Bench, in the above said decision, which is extracted below;

"18. On the other hand, the subsequent Full Bench judgment in Sankaranarayana Pillai Vs. Kandasamipillai, 1956 (2) M.L.J.1411: AIR 1956 Mad. 670, has placed the matter beyond doubt by answering two questions referred to them in the following manner.

"Our answer to the first question is that if the minor is eo nominee a party to a sale deed or other document of alienations, he must sue for the cancellation of the document under Section 7(iv-A) of the Court-Fess Act and it is not enough if he applies for possession under Section 7(v) of the Act;

and to the second question our answer is that there can be no distinction whether the father as guardian of the minor and not as the manager of the joint family executes the deed. Even in that case also the document has to be set aside."

There is no doubt whatever that the Full Bench has decided against the propositions now contended for by learned counsel for the appellant on the strength of the judgment in V.Nataraja Iyer & others V. Arunachalam & others, 1976 (2) M.L.J. 326.

19. A Division Bench of this Court, in which one of us was a party, had recently an occasion to consider the question in Sridharan & others V. Arumugham & others, 1993 (2) M.L.J. 428 and it has held that in so far as the documents in which the minor children are made parties, they are bound in law to pray for setting aside the same and without such prayer, the suit is not sustainable in relation to those documents:

20. Hence, the view taken by the trial judge that the suit is not maintainable in the absence of a prayer to set aside the alienations, is correct."

14. Therefore, it could be seen that the relief of declaration sought for by the plaintiffs, could not be taken as a prayer seeking for cancellation of the sale deed dated 27.08.1987 also and hence the valuation of the suit by the plaintiffs under Section 25(d) of the Act is not correct. Therefore, it could be seen that the plaintiffs should have sought for appropriate reliefs and valued the suit under Section 40 of the Act and accordingly, paid the court fees thereon.

15. As adverted to earlier, that the plaintiffs are eo-nominee parties to the sale transaction dated 27.08.1987 is not controverted. However, in answer to the above question of law projected by the counsel for the appellant, the learned Senior counsel appearing for the respondents contended that when the appellant has not established that he has been prejudiced by the under-valuation of the suit, the Court sitting in second appeal should not interfere with the judgements and decrees of the courts below and in this connection, he relied on Section 54 of the Act and also, the decision reported in **(1955) 1 SCR**

117 : AIR 1954 SC 340 (Kiran Singh and others V. Chaman Paswan and Others). A reading of Section 54 of the Court Fees Act above referred to would go to show that an objection as regards the over-valuation and under-valuation of the suit should not be entertained by the appellate court unless;

(a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower appellate Court in the memorandum of appeal to that Court, or

(b) the appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over- valued, or under-valued, and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits.

16. As regards point (a) above mentioned, it is found that the appellant has taken the plea of under-valuation of the suit in the first appellate court and the same is not controverted. However, on the point (b), it is argued by the Senior counsel for the respondents that the under-valuation of the suit has not prejudicially affected the

disposal of the suit or appeal on its merits and therefore, this Court sitting in second appeal should not interfere with the findings of the Courts below.

17. Countering the same, the counsel for the appellant contended that when the plaintiffs have not properly sought for the relief of cancellation and also, not properly valued the suit under the Court Fees Act and also, paid the due Court Fees thereon and on that ground alone the court should non suit the plaintiffs and therefore, under valuation of the suit has prejudicially affected the disposal of the suit or appeal on its merits. Further, according to him, if the relief of the setting aside the cancellation had been sought for, the defendants would have taken the plea of limitation also and such other pleas available to him as per law and if the plea of limitation is taken, the plaintiffs lis would fail and therefore, the non consideration of the under-valuation of the suit in the proper perspective by the lower appellate Court has seriously prejudiced the merits of the decision of the first appellate court and equally, the merits on the decision of the trial Court and therefore, according to him, this court should interfere in the findings of the Courts below as regards the question of under-valuation of the suit.

18. In the decision relied upon by the Senior Counsel appearing for the respondents, while considering the question of prejudice two examples of prejudice were suggested in the said decision viz., (i) there is no proper hearing of the suit or appeal and that had resulted in injustice (ii) on account of under valuation, the suit, which ought to have been filed in the civil court, has been laid in the small causes court jurisdiction and thereby, prejudice is caused , inter alia, as no right of appeal is provided against the decision of small causes court. After pointing to the above suggested two prejudice, the apex court proceeded to hold in the following manner.

" No purpose, however, is served by attempting to enumerate exhaustively all possible cases of prejudice which might come under Section 11 of the Suits Valuation Act. The jurisdiction that is conferred on appellate courts under that section is an equitable one, to be exercised when there has been an erroneous assumption of jurisdiction by a subordinate court as a result of over-valuation or under valuation and a consequential failure of justice. It is neither possible nor even desirable to define such a jurisdiction closely, or

confine it within stated bounds. It can only be predicated of it that it is in the nature of a revisional jurisdiction to be exercised with caution and for the ends of justice, whenever the facts and situations call for it. Whether there has been prejudice or not is, accordingly, a matter to be determined on the facts of each case."

Therefore, it could be seen that the Apex Court has held that as to whether there has been prejudice or not is a matter to be determined on the facts and circumstances of each case.

19. Now, we have to focus whether the under- valuation of the suit in the present case has caused prejudice as contemplated under Section 54 of the Act. As suggested by the Apex Court in the first prejudice above referred to, it could be seen that on account of the plaintiffs not asking for the relief of cancellation of the sale deed and valuing the suit under Section 40 of the Act, as rightly argued by the appellant counsel, the appellant had been deprived of the defending of the suit, inter alia, on the question of limitation also. Therefore, on that ground alone, it could be seen that there has been no proper hearing of the suit or appeal in this lis. Accordingly, it could be seen

that the appellant has raised the second question of law whether the suit prayer for declaration is barred by limitation. Therefore, in my considered opinion, the approach of the first appellate court in not adjudicating the question of under valuation of the suit in a proper manner, particularly, in the light of the decision of the full bench as mentioned supra and it could be seen that the plaintiffs admittedly being eo-nominee parties to the sale transaction dated 27.08.1987, ought to have asked the relief of cancellation of the sale deed in question and accordingly, valued the suit under Section 40 of the Act and paid due court fees thereon, and their failure to do so, has resulted in serious prejudice to the first defendant qua the disposal of the suit or appeal on its merits.

20. Inasmuch the plaintiffs have not asked for setting aside of the sale deed dated 27.08.1987, it has been found that serious prejudice and hardship has been caused to the first defendant in projecting his defence and accordingly, it could be seen that without cancelling the above said sale deed, the plaintiffs cannot be granted any further relief in the suit filed by them. In this connection, in the decision reported in **1993 2 MLJ page 428 (Sridharan and others V.Arumugam and others)**, it has been held that in so far as, the

documents, in which, the minor children are made parties, they are bound in law to pray for setting aside the same and without such prayer, the suit is not sustainable in relation to those documents. In the light of the above decision, it could be seen that the suit laid by the plaintiffs without seeking for a prayer to set aside the sale deed dated 27.08.1987 would not not sustainable and therefore, as rightly argued by the first defendant's counsel, the plaintiffs' suit should be dismissed.

21. Further, the first defendant's counsel also contended that the suit laid by the plaintiffs is hit by the law of limitation as per Article 59 of the Limitation Act. Article 59 of the Limitation Act provides that for the suit to cancel or set aside an instrument or decree or for the rescission of a contract, the period of limitation is three years and that the time from which period begins to run is that when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him; In so far as this case is concerned, as seen from the plaint averments, it could be seen that the plaintiffs are aware about the sale deed dated 27.08.1987 much prior to the filing of the suit. Even in the pre-suit notice dated 18.03.1991, the same has been referred to. That apart,

according to the plaintiffs, the sale deed dated 27.08.1987 has been executed by the second defendant without any legal necessity and against the interest of the plaintiffs. Further, it has also been averred in the plaint that the second defendant and the third defendant had started exhibiting hostile attitude towards the interest of the plaintiffs for the past five years. Therefore, it is evident that even according to the plaintiffs, the second defendant had been acting against the interest of the plaintiffs more than five years prior to the institution of the suit. For the cause of action to lay the suit, the plaintiffs have averred in para 7 of the plaint that, inter alia, the cause of action for the suit arose also in the year 1987, when the defendants 2 and 3 executed a registered sale deed in favour of the 4th defendant on 27.08.1987. The problem arose between the parties only after the alienation dated 09.03.1988 has been made by the 4th defendant in favour of the first defendant. Therefore, it could be seen that even though the sale deed dated 27.08.1987 was executed by the second defendant and the plaintiffs being eo nomine parties in favour of the 4th defendant, they had not evinced interest to adjudicate against the same and they have chosen to challenge the same and only after the alienation has been made in favour of the first defendant and hence, the suit. Therefore, all the above facts seen cumulatively, would go to

disclose that though the plaintiffs are aware of the sale deed dated 27.08.1987 and despite having knowledge about the same, as rightly put forth by the defendants counsel, the plaintiffs have not instituted the suit within 3 years period of time. It is thus evident that the suit laid by the plaintiffs for the relief of declaration as such, is barred by limitation. The argument that the plaintiffs suit for declaration could be construed as the relief of setting aside the sale deed dated 27.08.1987, even if accepted, it could be seen that the lis filed by the plaintiffs would be out of time as per Article 59 of the Limitation Act.

22. In this connection, it is argued by the learned Senior Counsel appearing for the respondents that the relevant Article would be only Article 60 and not 59 of the Limitation Act. However, as rightly put forth by the counsel for the first defendant, it could be seen that Article 60 would have no application to the present case and it is only Article 59 that would be relevant to the present case. As rightly put forth, Article 60 would come into play with reference to setting aside the transfer of property made by the guardian of a ward, without the ward having been added as a party in the transaction. Therefore, the contention that only Article 60 would apply cannot be countenanced.

23. In the light of the above discussion, it could be seen that the plaintiffs suit without seeking the relief of setting aside the sale deed date 27.08.1987 is unsustainable in the eyes of law and it could also be seen that the plaintiffs having failed to seek the relief of setting aside the sale deed dated 27.08.1987 within the time allowed by law, their suit is clearly hit by the law of limitation.

24. So viewed, the substantial questions of law formulated for consideration in this second appeal are answered in favour of the appellant and against the respondents.

In conclusion, the judgments and decrees of the courts below are set aside and the suit filed by the plaintiffs is dismissed and accordingly, the second appeal is allowed. No Costs. Consequently, connected miscellaneous of petition is closed.

23.11.2016

Index : Yes/No

Internet: Yes/No

sms

To

1. The Sub Judge,
Tiruvellore.

2. The District Munsif Court,
Tiruttani.

T.RAVINDRAN,J.

sms

Pre-delivery order in
S. A.No.3 of 2011
and
M.P.No.1 of 2011

23.11.2016

<http://www.judis.nic.in>