

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 19-08-2016

Pronouncement Date: 08-09-2016

Coram:

The Hon'ble Mr. Justice A.SELVAM
and
The Hon'ble Mr. Justice P.KALAIYARASAN

O.S.A.No.230 of 2007

1. J. Ganapatha
2. Marjilal
3. Davichand
4. Harisingh .. Appellants

Vs.

1. M/s. N. Selvarajalou Chetty Trust
Rep. by its Trustees
(1) Dr. H.B.N. Shetty, I.A.S. (Retd)
N.C. Ragavachari (Died)
(2) Sr. R.Krishnamoorthy
Having their office at No.34,
Rajaji Salai, Chennai 600 001
2. Sarvothaman
Adopted son of late
Somasundaram Chettiar
3. V. Arumugachandran सत्यमेव जयते
4. M. Ramachandran
5. Francis George
6. Elango .. Respondents

(RR5 and 6 impleaded as party respondents vide order of Court dated 12-11-2007 made in M.P.No.4 of 2007)

Original Side Appeal preferred under Clause 15 of Letters Patent read with Order XXXVI Rule 2 of Original Side Rules against the order of this Court dated 18-09-2006 made in C.S.No.504 of 1998.

For Appellant : Mrs. Chitra Sampath, Senior Counsel
for Ms.A.L. Ganthimathi

For Respondents : Mr.G. Masilamani, Senior Counsel for
Ms.V. Pushpa for R1
Mr. V. Prabhu for R2
Mr. T.V. Ramanujam, Senior Counsel
for Mr. Rajnish Pathiyil for R5
Mr. V.C. Janarthanam for R6
No appearance for R3
R4-Died (Memo filed and recorded)

JUDGMENT

(JUDGMENT OF THE COURT WAS DELIVERED BY A.SELVAM, J.)

This Original Side Appeal has been directed against the judgment and decree dated 18-09-2006 passed in C.S.No.504 of 1998 by the learned Single Judge of this Court.

2. The first respondent herein, as plaintiff, has instituted C.S.No.504 of 1998 on the file of this Court praying for the reliefs of declaration, permanent injunction and also for vacant possession of the suit property wherein the present appellants and the remaining respondents have been arrayed as defendants .

3. The averments made in the plaint are that one Mrs. Padmini Chandrasekaran has purchased the suit property by virtue of a sale deed dated 26-09-1963 executed by the Advocate Commissioner in pursuance of Court-auction sale. After purchase, she has become absolute owner of the same. During her life time, she has executed a Will dated 30-09-1975 and thereby, appointed Sri. R. Krishnamoorthy, Advocate and DR.H.B.N. Shetty, IAS as Executors of the Estate in accordance with the terms of the Will. The testator has vested the suit property in favour of the plaintiff-Trust and the names of the Trustees have also been mentioned. The Will has been probated as per order passed in T.O.S.No.28 of 1982 on 28-10-1995. The suit property and other properties have become absolute properties of the plaintiff. The plaintiff has come to know that the first defendant even though a party in the sale deed dated 26-09-1963 claimed right over the suit property by virtue of a Will alleged to have been executed by Somasundaram Chettiar. The first defendant through his Power of Attorney viz., the second defendant has sold the suit property in favour of the defendants 3 to 6. The first defendant has had no salable interest. The defendants 3 to 6 have not derived any title to the suit property. In the said circumstances, the present suit has been instituted so as to declare that the sale deeds effected in favour of the defendants 3 to 6 by the first defendant through

second defendant are void and also for the reliefs of permanent injunction and recovery of possession.

4. The written statement filed on the side of the defendants 3 to 6 may be summarised as follows:

The suit property originally belong to one Somasundaram Chettiar who is the none other than the father of the first defendant. The said Somasundaram Chettiar has purchased the same through a registered sale deed and he enjoyed the same during his life time. During his life time he has executed a Will dated 30-05-1962 and thereby, bequeathed the suit property in favour of the first defendant. The said Somasundaram Chettiar has passed away on 14-06-1962 and therefore, the Will dated 30-05-1962 has come into effect and the same has been probated as per order passed in O.P.No.131 of 1992. The first defendant has become absolute owner of the suit property. The defendants 3 to 6 have purchased the same and therefore, they are all bona fide purchasers for value without notice of any encumbrance. It is false to aver that one Mrs. Padmini Chandrasekaran has purchased the suit property on 26-09-1963 and the Court auction sale has not created any right in favour of Mrs. Padmini Chandrasekaran and there is no merit in the suit and the same is liable to be dismissed.

5. In the reply statement filed on the side of the plaintiff, it is averred that the first defendant has not derived any title through the Will alleged to have been executed by his father and further, his name is also found place in the sale deed executed in favour of Mrs. Padmini Chandrasekaran. The defendants 3 to 6 are not bona fide purchasers and therefore, the suit is liable to be decreed as prayed for.

6. In the written statement filed on the side of the first defendant it is averred that the suit property is the absolute property of the first defendant and he has not executed any Power of Attorney deed in favour of the second defendant. The sale deed alleged to have executed by the second defendant are totally void and there is no merit in the suit and the same deserves to be dismissed.

7. The material averments made in the reply statement filed by the defendants 3 to 6 are that on 10-08-1991, the first defendant has executed a Power of Attorney deed in favour of the second defendant and in pursuance of the same, he executed sale deeds in favour of defendants 3 to 6 and the same are valid. The first defendant has never enjoyed the suit property and therefore, it is prayed to reject the contention put forth on the side of the first defendant.

8. On the basis of the rival pleadings raised on either side, the learned Single Judge has framed necessary issues and

after analysing both the oral and documentary evidence has decreed the suit in favour of the Executor by name Dr. H.B.N. Shetty, I.A.S.. The judgment and decree passed by the learned Single Judge are being challenged in the present Original Side Appeal by the defendants 3 to 6, as appellants.

6. The sum and substance of the case of the plaintiff is that the suit property has been purchased by one Mrs. Padmini Chandrasekaran by virtue of sale deed dated 26-09-1963 and she voluntarily executed a Will dated 30-09-1975 and thereby, created the Trust of the plaintiff and appointed Sri. R. Krishnamoorthy, Advocate and DR. H.B.N.Shetty, IAS as executors and the said Will has been probated by virtue of the order dated 28-10-1995 passed in T.O.S.No.28 of 1982. Now the first defendant, through his Power of Attorney, viz., the second defendant has sold the property in favour of the defendants 3 to 6 and the sale deeds executed in their favour are nothing but void and cannot confer any right upon them and prayed for the reliefs sought in the plaint.

7. The defence put forth on the side of the defendants 3 to 6 is that the suit property is originally belonged to Somasundaram Chettiar who is none other than the father of the first defendant and he voluntarily executed a Will dated 30-05-1962 and thereby, bequeathed the suit property in favour of the first defendant and after his demise, the Will in question has been probated in O.P.No.131 of 1992 and therefore, the first defendant has become absolute owner of the suit property and his Power of Attorney agent viz., the second defendant has sold the same in favour of defendants 3 to 5 and thereby, the defendants 3 to 6 have become absolute owners of the suit property and neither the plaintiff nor the first defendant has had any right, title or interest over the same and therefore, the present suit deserves to be dismissed.

8. The learned Senior Counsel appearing for the appellants/defendants 3 to 6 has raised the following points so as to supplant the judgment and decree passed in C.S.No.504 of 1998:

(1) In the Trust Deed alleged to have been executed by Mrs. Padmini Chandrasekaran, the suit property bearing Survey No.170/2 measuring 0.75 cents out of 5 acre 15 cents has been bequeathed in favour of one Vinayagamurthy, S/o.Natesan Chettiar. Under the said circumstances, the said Vinayagamurthy has become absolute owner of the suit property and neither the plaintiff nor its executors has had any right over the same and the learned Single Judge has committed a mistake in decreeing the suit.

(2) The entire case of the plaintiff is based upon the judgments and decrees passed in O.S.A.Nos.40 of 1960 and 60 of 1959 wherein the father of the first defendant by name

Somasundaram Chettiar has been shown as the first defendant/second respondent and during pendency of the same, he passed away. After his demise, his legal heirs have not been brought on record and therefore, the court auction sale alleged to have been made in favour of Mrs. Padmini Chandrasekaran is totally void and the learned Single Judge has failed to look into the same.

(3) In C.S.No.504 of 1998, all the reliefs have been sought in favour of the plaintiff-Trust. But the learned Single Judge has erroneously moulded the reliefs in favour of one of the Executors of the Trust and therefore, the judgment and decree passed by the learned Single Judge are totally erroneous.

9. In order to resile the contentions put forth on the side of the appellants, the learned Senior Counsel appearing for the first respondent/plaintiff has befittingly contended that even in the Trust Deed, it has been clearly mentioned that the suit property admeasuring 0.75 cents has to be sold by executors and the sale proceeds should be deposited in a Bank and the beneficiary by name Vinayagamurthy is entitled to get only interest and therefore, no absolute interest or title has been created in his favour. Prior to execution of Trust Deed, the said Padmini Chandrasekaran has instituted O.S.A.No.49 of 1960 and the father of the first defendant by name Somasundaram Chettiar and others have instituted O.S.A.No.60 of 1959 wherein the suit property and some other properties have been brought for sale and through Advocate Commissioner a sale deed has been executed in favour of Padmini Chandrasekaran on behalf of the respondents therein and therefore, the said Padmini Chandrasekaran by virtue of the said sale deed has become absolute owner of the suit property. The first defendant has had no right over the same. The first defendant through his Power of Attorney viz., the second defendant has erroneously sold the suit property in favour of defendants 3 to 6 and the sale deeds executed in their favour are nothing but void. Under the said circumstances, the present suit has been instituted for the reliefs sought therein and the learned Single after considering the fact that the Trust mentioned in the plaint is not having right, title and interest over the suit property has rightly moulded the relief and granted the same in favour of the Executor of the Trust and therefore, the judgment and decree passed by the learned Single Judge do not warrant any interference.

10. The first and foremost point urged on the side of the appellants/defendants 3 to 6 is that the executant viz., Mrs. Padmini Chandrasekaran has not created any interest or title in respect of the suit property in favour of the Trust mentioned in the Trust Deed. But the suit property has been bequeathed in favour of Vinayagamurthy, S/o. Natesan Chettiar.

11. For considering the first point raised on the side of the appellants/defendants 3 to 6, the Court has to look into Paragraph No.10 of the Trust Deed, wherein it has been clearly mentioned as follows:

"I bequeath to Sri Vinayagamurthy, son of Natesan Chettiar, residing at No.122, P.V. Koil Street, Royapuram, Madras, land in Survey No.170/2, 0.75 cents out of 5 Acres 15 cents. As he has got children, I want my Executor to sell the said property viz., 75 cents and deposit the sale proceeds into a long term Fixed Deposit and to pay interest alone to Vinayagamurthy and after his life time, the Fixed Deposit, the Principal amount shall be taken by his children in equal shares."

12. A mere perusal of Paragraph No.10 of the Trust Deed would clearly go to show that no absolute interest or title has been created in respect of the suit property in favour of the said Vinayagamurthy. The specific direction given to the executors is to sell the same and deposit sale proceeds in a long term Fixed Deposit and pay interest alone to the said Vinayagamurthy. Therefore, it is needless to say that the said Vinayagamurthy or his legal heirs has had no right, title or interest over the suit property. Under the said circumstances, the first and foremost contention put forth on the side of the appellants/defendants 3 to 6 is sans merit.

13. The second contention put forth on the side of the appellants/defendants 3 to 6 is that in O.S.A.No.49 of 1960, the father of the first defendant by name, Somasundaram Chettiar, has been arrayed as first respondent and likewise in O.S.A.No.60 of 1959, the said Somasundaram Chettiar has been shown as first appellant and during pendency of the same, he passed away. But his legal heirs have not been brought on record and therefore, the sale deed alleged to have been executed by the Advocate Commissioner in favour of Mrs. Padmini Chandrasekaran is absolutely void.

14. For considering the second point raised on the side of the appellants/defendants 3 to 6, it would be more useful to look into the sale deed alleged to have been executed by the Advocate Commissioner in pursuance of Court auction in favour of Mrs. Padmini Chandrasekaran. The said sale deed has been marked as Ex-P8. In fact, this Court has closely perused Ex-P8 wherein it has been clearly stated that after the demise of the said Somasundaram Chettiar, his legal heirs including the first defendant herein have been brought on record in O.S.A.Nos. 49 of 1960 and 60 of 1959 and further, Ex-P8 has been executed even on behalf of the first defendant by the Advocate Commissioner in favour of Mrs. Padmini Chandrasekaran. Therefore, the second point urged on the side of the appellants/defendants 3 to 6 also goes out without merit.

15. The third point urged on the side of the appellants/defendants 3 to 6 is that the learned Single Judge cannot mould the reliefs and therefore, the judgment and decree passed by the learned Single Judge are totally erroneous.

16. At this juncture, the Court has to look into decisions relied upon by the learned Senior Counsel appearing for the appellants/defendants 3 to 6 as well as learned Senior Counsel appearing for the first respondent.

17. On the side of the appellants, the following decisions are relied upon:

(1) 43 LW 238 (Kanchamalai Pathar Vs. Ry. Shahaji Rajah Sahib), wherein the Full Bench of this Court has held that before sale, the judgment debtor has passed away and his legal heirs have to be brought on record under Section 50 of the Code of Civil Procedure, 1908.

It has already been pointed out that after the demise of Somasundaram Chettiar, father of the first defendant herein, all his legal heirs have been brought on record in the proceedings of O.S.A.Nos.49 of 1960 and 60 of 1959 and further, the first defendant is also one of the vendors in the sale deed executed in favour of Mrs. Padmini Chandrasekaran by the Advocate Commissioner on 26-09-1963. Therefore, the decision reported supra, cannot be attuned in the present case.

(2) In 2014(8) SCC 294 (Gaiv Dinshaw Irani and others Vs. Tehmtan Irani and others), the Honourable Supreme Court has held that the Court may mould the relief in accordance with the changed circumstances, for shortening the litigation or to do complete justice.

In the instant case, as mentioned supra, the Executant of the Trust has purchased the suit property and some other properties through the Advocate Commissioner in pursuance of the direction of this Court, by virtue of Ex-P8. Therefore, by virtue of Ex-P8, the Executant of the Trust Mrs. Padmini Chandrasekaran has derived absolute right, title and interest over the suit property and subsequently, created the Trust of the plaintiff and thereby appointed two Executors as mentioned in the plaint.

18. The learned Single Judge after making elaborate discussion has found that the Trust in question is not having right, title and interest over the suit property and since Administrators have been appointed to administer the estate of the deceased, moulded the reliefs as mentioned supra.

19. Even as per the dictum given by the Honourable Supreme Court, the Court can easily mould the relief for doing complete justice.

20. The specific defence taken on the side of the appellants/defendants 3 to 6 is that the first defendant through his Power of Attorney Agent viz., second defendant has sold the suit property in favour of them and thereby, they derived valid right, title and interest over the same. It has already been pointed out that even on 26-09-1963, the executant of the Trust viz., Mrs. Padmini Chandrasekaran has derived valid title to the suit property and some other properties. Under the said circumstances, the first defendant had no salable interest in the suit property. In the written statement filed on the side of the first defendant, it is stated to the effect that the first defendant has not authorised anybody to execute sale deed in favour of defendants 3 to 6. Even assuming without conceding that the second defendant as Power of Attorney of the first defendant has sold the suit property in favour of the defendants 3 to 5, since the first defendant has had no salable interest over the suit property, the sale deeds executed in favour of the defendants 3 to 6 are nothing but void. Since the sale deeds executed in favour of the defendants 3 to 6 are nothing but void and since the executant viz., Mrs. Padmini Chandrasekaran has derived valid right, title or interest by virtue of the sale deed, Ex-P8 and subsequently appointed Executors to administer her estate, the Court is bound to mould the relief for doing complete justice. The learned Single Judge, after considering the fact that the Trust mentioned in the plaint is not having right, title and interest over the suit property, has rightly moulded the reliefs and granted a decree in favour of one of the Executors. Therefore, there is no flaw in the judgment and decree passed by the learned Single Judge.

21. In 2015 (9) SCC 755 (Nandkishore Lalbhai Mehta Vs. New Era Fabrics Private Limited), the Honourable Supreme Court has held that unless specific pleadings are raised appropriate relief cannot be granted beyond the pleadings.

22. In the instant case, there is no variation of pleadings and proof on the side of the plaintiff. Under the circumstances, the decision referred to supra is not suited with the facts and circumstances of the present case.

23. In 2014 (4) CTC 471 (Union of India Vs. Vasavi Co-op Housing Society Ltd.) the Honourable Supreme Court has held that in a suit for declaration of title and possession, the plaintiff has to succeed or fail on the basis of his own case and not on the basis of weakness of the defence.

24. It is a settled principle of law that in a suit for declaration and recovery of possession, the plaintiff has to succeed or fail on the basis of his own case and not on the basis of weakness of other side. In the instant case, such a situation has not arisen and therefore, the entire argument advanced by the learned Senior Counsel appearing for the appellants/defendants 3 to 6 are of no use.

25. Now the Court has to look into the decisions referred to on the side of the first respondent/plaintiff.

(i) In AIR 1939 Madras 802 (Budhiraju Seethayamma and others Vs. Vullipalam alias Putrevu Jagannadha Rao and others), this Court has held that Court auction sale shall be binding upon the parties, unless it is challenged or set aside.

(ii) In 1967 (2) SCR 77 = AIR 1967 SC 608 (Janak Raj Vs. Gurdial Singh), the Honourable Supreme Court has held that Court auction sale cannot be questioned after lapse of limitation.

26. As rightly contended on the side of the first respondent/plaintiff, the said Mrs. Padmini Chandrasekaran has purchased the suit property under Ex-P8, even in the year 1963. The present suit has been instituted in the year 1998. Under the said circumstances, without challenging the Court auction sale neither the first defendant nor other defendants can attack Ex-P8.

27. The learned counsel appearing for the sixth respondent has relied upon the decision reported in 2002 (4) LW 534 (Angammal & others Vs. Komara Gounder & others) wherein this Court has held that a Judge will not give any relief other than the relief sought in the plaint. It has already been pointed out on the basis of the dictum given by the Honourable Supreme Court that for doing complete justice in a litigation, the Court can very well mould the relief.

28. Even at the risk of repetition, this Court would like to say that the said Mrs. Padmini Chandrasekaran, by virtue of Ex-P8 has derived valid right, title and interest over the suit property and she subsequently, created a Trust and thereby appointed two Administrators. Even though the said Trust has instituted the present suit through its Executors, the learned Single Judge as stated earlier has found that the Trust is not having right, title or interest over the suit property and the Executor is having right to administer the suit property. Under the said circumstances, viewing from any angle, the judgment and decree passed by the learned Single Judge do not suffer from any infirmity nor illegality and therefore, the present Original Side Appeal deserves to be dismissed.

In fine, the Original Side Appeal is dismissed with costs.
The judgment and decree passed in C.S.No.504 of 1998 dated 18-09-2006 by the learned Single Judge are confirmed.

Sd/-
Asst.Registrar (CS V)

/true copy/

Sub Asst. Registrar

To
The Sub Assistant Registrar,
Original Side,
High Court, Madras.

+1 cc to M/s.Al.Gandhimathi, advocate,sr.51474

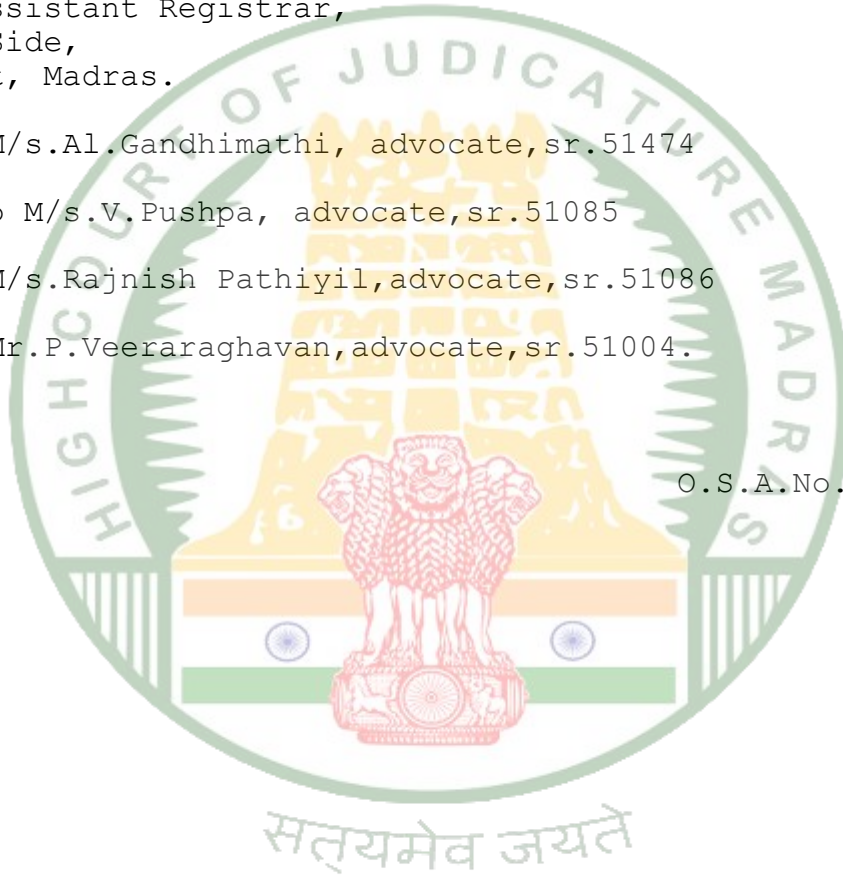
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