

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 08.02.2017

Coram

The Hon'ble Mr.Justice M.M.Sundresh

S.A.No.732 of 2015

Jayanthi

...Appellant

versus

1 Kalaimagan Raja

2. Kanagasabai.

... Respondents

Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgement and decree, dated 14.03.2014, made in A.S.No.25 of 2012, on the file of the Sub Court, Ariyalur, in confirming the judgment and decree, dated 27.02.2012, made in O.S.No.38 of 2006, on the file of the District Munsif Court, Jayamkondam.

For Appellant : M/s.N.Mala

For Respondents: Mr.P.Valiappan

JUDGEMENT

The plaintiff, who filed the suit in the year 2006, for declaration to set aside the sale deed executed by her father in the year, 1992 as null and void, is the appellant herein, seeking to set aside the concurrent judgments and decrees rendered by the Courts below with the following Substantial Questions of law:-

a) Whether the judgment and decree of the Lower Appellate Court is vitiated for not following the mandatory procedure of framing points for determination under Order 41 Rule 31 of CPC?

b) Whether the Lower Appellate Court in its thinking and finding that the suit is barred by limitation overlooking the fact that under Article 60 of the Limitation Act, the suit filed within 3 years of attaining majority is very much maintainable?

and

c) Whether the Lower Appellate Court was right in law in relying on Article 58 of the Limitation Act, for its finding that the suit is barred by limitation overlooking that the appropriate Article under the facts and circumstances of the case is Article 60 and not Article 58?

2. Ex.A1 is the sale deed with respect to the suit property executed by the father of the plaintiff in favour of the first defendant. At the time of execution of Ex.A1, both the plaintiff and the first defendant were minors. Ex.A1 states that the suit property is a joint family property, and, it has been sold on behalf of the Executor and the plaintiff for family necessity. After the sale made in favour of the first defendant, the suit property was sold in favour of the second defendant, under Ex.B.1, dated 13.07.2005, which is also much prior to the filing of the suit. The plaintiff contended that the sale deed is only a loan transaction, valuation mentioned therein is very low, the suit property is joint family property, and there is no family necessity. The defendants contended that, suit property is a self acquired property of the father of the plaintiff, and there is no bona fide in the suit filed. It is also barred by limitation. It is also contended that the averments made under Ex.A1 are true.

3. The learned counsel for the appellant submits that, in view of the admission made in the evidence of D.W.1 and D.W.2, the suit property has to be held to be joint family property. There is no limitation involved, since, even as per Ex.A.1, the plaintiff was about 7 years, and therefore, the suit having been filed before the completion of 21 years, the same is maintainable. There is also an admission with respect to the age of the plaintiff in the evidence of the defendants. It is for the defendants to show and prove the family necessity, which necessitated for the sale of the property. Thus, the judgements rendered by the Courts below would require interference.

4. The learned counsel for the respondents/defendants submitted that, it is a collusive suit filed by the daughter/plaintiff, at the instance of the father. That is the reason, why the plaintiff's father has never come before the Court either as witness or a party defendant. This aspect has been taken note of by the Courts below. Under Section 101 of the Indian Evidence Act, it is for the plaintiff to establish that the suit is maintainable, as the defendants cannot say with certainty the exact age of the plaintiff. The documents marked,

itself, would make it clear about the family necessity. When the plaintiff contended that Ex.A.1 is only a loan transaction, it is for her to prove it in the manner known to law. Except, Ex.A.1, the plaintiff has not filed any document. Thus, no interference is required, when both the Courts below appreciated the evidence available on record.

5. As rightly pointed out by the learned counsel for the respondents, it is a collusive suit filed by the plaintiff, at the instance of her father, that is reason for not arraying her father as party defendant or examining him as witness. It is he, who executed Ex.A.1, which is not in dispute. The Courts below have rightly found that the plaintiff has not given her exact date of birth and age. Therefore, reliance on Section 101 CPC cannot be faulted. Section 3 of the Limitation Act mandates that the Court has to decide the question of limitation for the purpose of maintaining the suit. Ex.A.1 was executed in the year, 1992. The suit has been filed in the year, 2006. In the meanwhile, one more sale deed has been executed. If it is the case of the plaintiff that, she is in joint possession, she cannot plead ignorance of the fact that the suit property has been parted away by her father way back in the year 1992.

6. Therefore, despite the issue pertaining to the question of limitation, the plaintiff/appellant cannot plead ignorance of the fact that, she is in possession of the suit property over years. This lend credence to the observation made by the Courts below that the suit lacks bona fides. There is absolutely no other material produced by the plaintiff, except, filing Ex.A1, followed by issuance of legal notice. One more factor, which has to be seen is that, even the first defendant was minor at the time of sale of the share of immovable property, which is a joint family property by the Kartha. Can it appears to be voidable and not void on the same score, minor can accept the property, but restriction would apply only for sale.

7. The Courts below have recorded that at the time of deposition, the plaintiff, who has been examined as P.W.1, she was married, and for nine years her father was also alive. There is no material to hold that Ex.A.1 has been created by the father against the interest of the plaintiff. Thus, this Court is of the view that, there is no substantial question of law, warranting interference of this Court, in exercise of jurisdiction under Section 100 CPC over the findings rendered by the Courts below.

8. In the result, the Second Appeal is dismissed, confirming the judgements and decree passed by the Courts below. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1. The District Munsif Court,
Jayamkondam.
2. The Sub Court,
Ariyalur.

+1cc to Mr.P.Valliappan, Advocate Sr.8473
+1cc to Mr.N.Mala, Advocate Sr.8263

S.A.No.732 of 2015

rj[col]
srg 21/03/2017

सत्यमेव जयते

WEB COPY