

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:09.08.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANIC.R.P.(PD)No.3901 of 2013

Orders reserved on 27.06.2017	Orders pronounced on 09.08.2017
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Thulukamuthur Primary Agricultural
Co-operative Society,
rep. By its President,
Thulukamuthur,
Avinashi, Tiruppur District.

.. Petitioner

Vs.

1. T.K.Natarajan,
Kizahalathottam,
Thulukamuthur Post,
Avinashi, Tiruppur District.
2. The Deputy Registrar,
Co-Operative Societies,
District Collector's Office Compound,
Coimbatore 641 018.

.. Respondents

PRAYER: Civil Revision Petition filed Under Article 227 of the Constitution of India, against the fair and decreetal order dated 22.02.2013 made in C.M.A.No.32 of 2012, on the file of the Principal District Judge, Tiruppur, reversing the order of the Deputy Registrar Co-operative Societies, Coimbatore in C.E.P.No.169 of 2000 dated 02.01.2009.

For Petitioner : Mr.J.Hariharan
for Mr.V.Nicholas
For R1 : Mr.S.V.Jayaraman, Senior Counsel
for Mr.K.Goviganesan
For R2 : No appearance

ORDER

This Civil Revision Petition has been filed against the fair and decretal order dated 22.02.2013, made in C.M.A.No.32 of 2012 on the file of the Principal District Judge, Tiruppur, reversing the order of the Deputy Registrar Co-operative Societies, Coimbatore in C.E.P.No.169 of 2000 dated 02.01.2009.

2. Petitioner is the second respondent, first respondent is the appellant and second respondent is the first respondent in C.M.A.No.32 of 2012, on the file of the Principal District Judge, Tiruppur.

3. Facts of the Case: The first respondent's son, N.Venkatachalam was the President of petitioner Society from 24.03.1999. He, in collusion with the Secretary, Aruljothi, misappropriated a sum of Rs.32,54,243.53/- of the petitioner Society. An enquiry was conducted under Section 81 of the

Tamilnadu Co-operative Societies Act, 1983 (herein after referred to as 'the act') against the said N.Venkatachalam and Aruljothi. The properties belonging to N.Venkatachalam were attached before the order of Circle Deputy Registrar by orders No.169 of 2000Sa.Pa3 dated 31.08.2000 and 18.01.2000. The first respondent filed petition Ni.Ma.169 of 2000Sa.Pa3 before the second respondent for raising the attachment dated 31.08.2000 in respect of an extent of 15.25 acres, on the ground that the said lands are allotted to his share in the partition effected on 21.07.2000 between himself and his sons, N.Venkatachalam, N.Palanisamy and T.N.Sanjay. The second respondent dismissed the said petition, on the ground that the enquiry under Section 87 of the Act is pending and the claim of the first respondent can be considered only after the orders being passed in the said proceedings.

4. The first respondent filed C.M.A.No.116 of 2001 on the file of the District Judge, Thiruppur (Co-operative Tribunal). By the order dated 03.08.2007, the learned District Judge, set aside the order of the second respondent and remanded the matter to the second respondent to consider and pass orders on merits.

5. On remand, the first respondent submitted that:

(i) The property in question was allotted to him by his father. After the demise of his father, by the partition deed dated 21.07.2000 registered as document No.3102 of 2000, all the properties were partitioned among himself and his sons N.Venkatacalam, N.Palanisamy and T.N.Sanjay. The property measuring 15.25 cents was allotted to him. The partition was effected before order of attachment. After partition, the property belonging to first respondent cannot be attached. After partition, each person is in possession and enjoyment of their respective shares. The first respondent is not a member of the Society. Enquiry under Section 81 of the Act was not conducted against the first respondent. Without any surcharge proceedings against the first respondent, attachment under Section 167 of the Tamilnadu Co-operative Societies Act, 1983 cannot be effected. The Secretary of the

Society admitted the misappropriation and agreed to pay the amounts to the Society.

(ii) The petitioner opposed the petition of the first respondent on the ground that the first respondent was President of petitioner Society during the period, 1967-1977. For the misdeeds of the first respondent, by the order dated 28.05.1977, bearing No.Na.Ka.14707 of 77B4, the Joint Registrar Cooperative Societies, Coimbatore Circle permanently disqualified the first respondent. This Court, by the order passed in W.P.No.5773 of 1997, confirmed the same.

(iii) Enquiry under Section 81 of the Act and surcharge proceedings under Section 87 of the Act were initiated against the first respondent's son, N.Venkatachalam and the Secretary Aruljothi for their misappropriation of funds of the Society. The first respondent and his sons, in order to avoid attachment, hastily

effected partition and the same is not binding on the petitioner. The Secretary, President and first respondent misappropriated the funds and knowing the steps taken by the petitioner Society, the first respondent and his sons have partitioned the properties in order to avoid attachment on payment of amounts due to the petitioner Society.

(iv) By the partition, the first respondent was allotted major portion of land and his sons were allotted only very small extent of land, on the ground that any time property would be attached before final orders. The partition in question is not binding on the petitioner Society and if they had no objection, they should have informed the Society when the enquiry was pending. The first respondent's son was a President and he had over all supervision of activities of the Society. The first respondent's son and Secretary have misappropriated the

funds of the Society and prayed for confirming the order of attachment dated 31.08.2000.

6. The second respondent, considering the materials on record and contention of the learned counsel for the petitioner, held as follows:

a. The property in the Schedule A in partition deed dated 24.07.2000 belongs to the first respondent and it is not a family property.

b. In view of the Section 53 of the Transfer of Property Act, the partition is not valid, as equal shares are not allotted to the first respondent's sons and partition deed dated 21.07.2000 is not legally valid.

For the above reasons, dismissed the petition filed by the first respondents.

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7. Against the said order dated 02.01.2009, the first respondent filed C.M.A.No.32 of 2012 on the file of the Principal District Judge, Thiruppur, challenging the order of the second

respondent. The learned Judge, held that when in a partition, the properties are not allotted to the sharers equally, the same is voidable as per Section 53 of Transfer of Property Act. If such a partition is with an intention to defeat and delay the interest all creditors, the said creditors are entitled to initiate legal proceedings to get the same declared as not valid. Only a Civil Court can consider and pass a decree, when a claim is made under Section 53 of the Transfer of Property Act. The learned Judge, held that the second respondent has not properly considered the provisions of the Section 53 of the Transfer of Property Act and therefore, finding of the second respondent is not valid, as he has not applied the law properly. The learned Judge also held that the order of the second respondent is contradictory to the findings given by him. The respondent has given a finding that property in question belongs to the first respondent, but held that partition deed is not valid. In view of this contradictory finding, the learned District Judge, set aside the order of second respondent and raised the order of attachment dated 31.08.2000 and 08.01.2000 and allowed the appeal.

8. Against the said order dated 22.02.2013, made in C.M.A.No.32 of 2012, the present civil revision petition is filed by the petitioner Society.

9. The learned counsel appearing for the petitioner contended that the first respondent was the President of petitioner Society for a period of 10 years and was well aware of all the rules and regulations of the procedure. For the misdeeds committed by him during the tenure of him, he was permanently disqualified and the said order was confirmed by this Court. The first respondent's son as a President, in collusion with Secretary, misappropriated the funds of the Society. Enquiry under Section 81 of the Act and surcharge proceeding under Section 87 of the Act were initiated against the son of the first respondent for the said misappropriation. Coming to know that the properties would be attached to secure the interest of petitioner Society, the first respondent and his sons have hastily created the partition deed dated 21.07.2000. A reading of the partition deed would clearly reveal that the same is sham and nominal. The major portion of the properties viz., 15.25 cents were allotted to the first respondent and only a small portion of the land were allotted to the sons of the first respondent. This partition is

effected only with an intention to defeat the interest of the creditor. The learned Judge, erred in holding that only a Civil Court can declare a partition is void in the suit filed by the creditor. Once it is proved that in the partition deed, the properties are not equally distributed and the same was done to defeat his creditor, the said partition deed is held to be void.

10. The judgments relied on by the learned counsel for the petitioner are as under:

I) Rattan Devi Vs. Jagadhar Mal reported in AIR 1956

PUNJAB 46:

11. It cannot be said that a Hindu Male proprietor can defeat the rights of his creditors by entering into partition with his sons and wife nor can it be said that the rights of the creditors to recover money from the joint family property, and this is supported by a judgment of the Oudh Court in – 'Bhagwant Singh V. Daulat Singh', 21 Ind Cas 757 (J).

II) Sushilabehn and others Vs. V.Anandilal Bapalal and others reported in AIR 1983 GUJARAT 126:

12. Assuming, however, that partition and for that matter release deed

does not amount to a transfer, within the meaning of the term 'transfer of property' as prescribed in Sec.5 and, therefore, not within the purview of S.53, the principle of trial section can be invoked and would apply even though the section may not apply in terms since the principle underlying it is of wider application and S.53 is not exhaustive. If the object of a given instrument of a partition or a release deed is not merely to give to a sharer would be able to defeat the creditors. It would amount to a fraudulent partition.

14. Here the admitted circumstances that the parties to the impugned release deed have not considered the extent of the debts of the first defendant and in any case, the value of the share which has been paid to him, is so meagre that he would be hardly able to pay about 25% of his total debts. This one circumstance alone is sufficient to establish that the intention was not merely to release his share in the interest of the suit property but was to defeat and delay the creditors. The second contention, therefore else requires to be rejected.

11. Per contra, the learned senior counsel appearing for the first respondent submitted that the partition is effected with an intention that each party may enjoy the property allotted to them without interference by other sharers. In the present case, even though a larger extents of land measuring 15.25 cents were allotted to the first respondent, the sons of the first respondent were allotted shares equal to the value of the properties allotted to the first respondent. The learned Senior counsel referred to Schedule in the partition deed and value mentioned therein and submitted that each party is allotted almost equal shares. Without filing a suit, the petitioner cannot contend that the partition deed is void *ab initio* and not valid in law. The second respondent having held that the land measuring an extent of 15 acres, 25 cents belongs to the first respondent, erred in confirming the order of attachment. The learned District Judge has considered the facts and law properly and allowed the appeal by giving valid reasons. The learned Senior Counsel contended that the order of attachment was passed after the partition effected came into force and attachment made subsequent to partition is invalid. The learned Senior Counsel further contended that only one creditor can not invoke Section 53 of the Transfer of Property Act to get a declaration that transfer is

void. To substantiate the above contention, learned Senior Counsel relied on decision reported in **2006 (4) MLJ 820 (Pinna Thevar Vs. M.S.Maniam and another)**

12. Heard the learned counsel for petitioner and learned Senior Counsel appearing for the first respondent and perused the materials on record.

13. The points for consideration in the present civil revision petition are:

I) Whether order of second respondent holding partition deed dated 21.07.2000 is void and not valid in law is correct.

II) Whether the finding of the learned Principal District Judge that only by a decree in Civil Court, the partition deed in question can be declared as void brought into force to defeat and delay the creditors is correct.

III) Whether the creditor has to initiate civil proceedings and obtain a decree of declaration that partition in question is void.

14. To decide the above points, the scope of Section 53 of the Transfer of Property Act, 1882 has to be considered:

"53. Fraudulent Transfer:

1. Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration. Nothing in this sub-section shall affect any law for the time being in force relating to insolvency. A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.

2. Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee. For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."

15. A reading of said Section reveals that any transfer made with the intent to defeat or delay the creditors of transferee shall be voidable at the instance of any creditor, whose interest is defeated or delayed. This Section also reveals, a suit has to be instituted by a

creditor on behalf of or for the benefit of all the creditors including a decree holder. A reading of partition deed clearly shows that all the sharers are not allotted equal shares. The first respondent is allotted 15.25 acres and value is given a Rs.35,700/-. The first respondent's son, N.Venkatachalam, against whom Section 81 enquiry and Section 87 surcharge proceedings are initiated, was allotted only 2.58½ acres. The value of his share is inflated by stating that he had already taken cash from joint family funds, amounting to Rs.2,25,200/-. The other two sons were allotted 4.19 acres and value of their shares were inflated by inflating the value of two wells, motor and electricity connection. This makes it clear that partition in question is only a sham and nominal and was entered by first respondent and his sons, only to defeat and delay the interest of the creditor, Viz., the petitioner herein.

16. The order of attachment effected by second respondent was raised by the learned Principal District Judge, (Cooperative Tribunal) on the ground that only Civil Court has jurisdiction to declare a transfer as void, when it is proved by a creditor that such transfer is made with intent to defeat or delay the interest of creditors or the transferor. The learned Judge failed to see that as

per the Section 146 of the Tamilnadu Cooperative Societies Act, the Registrar or any person empowered by him shall be deemed as a Civil Court when exercising any power under the Act for recovery of any amount by attachment and sale or by sale without any attachment. The scope of Section 146 of the Tamilnadu Cooperative Societies Act is clear that the Authority under Cooperative Societies Act, while taking steps by attachment and sale or sale without attachment is acting as a Civil Court. In view of this power conferred on the Authority, the second respondent, who is the person empowered by Registrar is deemed to be exercising the power of Civil Court. Therefore, the order of the second respondent, holding that as per Section 53 of the Transfer of Property Act partition deed is not valid, is valid and legal. The learned principal District Judge, Tiruppur, has failed to take note of the fact that Authorities under Act, while conducting the proceedings for recovery of money, deemed to be Civil Court. Further, the learned Judge has committed an irregularity in raising the order of attachment in entirety, when admittedly first respondent was allotted only 15.25 acres. The learned Principal District Judge, raised the attachment in respect of the properties allotted to the sons of first respondent, even though they have not taken any steps for raising attachment.

This clearly shows non application of mind by the learned Principal District Judge. The learned Judge, has not properly exercised powers conferred on him by failing to appreciate the facts and law in proper perspective.

17. The contention of the learned Senior Counsel appearing for the first respondent that a single creditor cannot invoke Section 53 of the Transfer of Property Act for a declaration that a transfer is void and the decisions relied on by the learned Senior Counsel are not applicable to the facts of the present case. It is the first respondent, who has approached the second respondent for raising order of attachment and it is for him to prove that partition deed effected is valid and legal and not sham and nominal. In the partition deed relied on by the first respondent, very meagre land only is allotted to the share of N.Venkatachalam, the son of the first respondent, who according to the petitioner has misappropriated Rs.32,54,243.53/- of the funds of the Society, which in turn is the funds of general public. The intention of the petitioner and his son are only to defeat the interest of the petitioner and preventing them from recovering the misappropriated amounts from N.Venkatachalam, who is the son of the first respondent.

V.M.VELUMANI, J.

gsa

18. In the result, the civil revision petition is allowed. The order of the learned Principal District Judge in C.M.A.No.32 of 2012 is set aside. Orders of attachment dated 31.08.2000 and 18.01.2000 are confirmed. No costs.

09.08.2017

Index: Yes/No
Internet: Yes/No
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To

1. The Principal District Judge, Tiruppur
2. The Deputy Registrar,
Co-Operative Societies,
District Collector's Office Compound,
Coimbatore 641 018.
3. The President,
Thulukamuthur Primary Agricultural
Co-operative Society,
Thulukamuthur,
Avinashi, Tiruppur District.

Pre-delivery order made in
C.R.P.(PD)No.3901 of 2013