

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.07.2018

PRONOUNCED ON : 27.07.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1558 of 2003

&

C.M.P.No.4623 of 2018

P.K.Rangayyan ...Appellant/1st respondent /1stDefendant

Vs.

1.P.K.Chinnasami ...Respondent/Appellant /Plaintiff

2.P.K.Palanisamy

3.P.S.Thirugnanasambandam

4.P.S.Natarajan

5.P.K.Palanisamy 2 to 5 respondents/respondents /Defendants

6.P.K.Subramaniam

7.P.K.Krishnasamy

8.P.K.Rangasamy

9.P.K.Kalyanasundaram

10.Sivakami

11.Gandhimathi6 to 11 Respondents/ respondents

(Respondents 2 to 11 exparte
in the Courts below and hence,
no notice need be sent to them)

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 28.06.2002 passed in A.S.No.31 of 2002 on the file of the learned Additional District Judge, Fast Track Court No.IV, Erode, at Bhavani, reversing the Judgment and Decree dated 13.11.2000 passed in O.S.No.165 of 1997 on the file of the Subordinate Court, Bhavani.

For Appellant

: Mr.N.Manokaran
for Mr.R.Prabakaran

Respondent No.1

: Set exparte
vide order dated 08.06.2018

Respondent Nos.2 to 11

: Notice dispensed with

JUDGMENT

Challenge, in this second appeal, is made to the Judgement and Decree dated 28.06.2002 passed in A.S.No.31 of 2002 on the file of the Additional District Judge, Fast Track Court No.IV, Erode, at Bhavani, reversing the Judgment and Decree dated 13.11.2000 passed in O.S.No.165 of 1997 on the file of the Subordinate Court, Bhavani.

2. The second appeal has been admitted on the following substantial questions of law:

" (a). Whether the lower Appellate Court is right in holding that Ex.A3 partition deed between the parties is sham and nominal, overlooking that admittedly Ex.A3 was entered into by the parties voluntarily, executed, got registered and acted upon by paying separate kists, transferring pattas and transferring the electricity service connections in their respective names?

(b). Whether the present suit for partition is maintainable without a prayer for setting aside the earlier partition under Ex.A3 entered into by the parties?"

3. Considering the scope of the issues involved in the matter between the parties as regards the subject matter lying in a narrow compass, it is found unnecessary to dwell into the facts of the case in detail.

4. The suit has been laid by the plaintiff for partition and also for the relief of declaration.

5. The relief of declaration is sought for by the plaintiff as regards the partition deed dated 10.10.1988 marked as Ex.A3 and the plaintiff by way of the suit seeks the relief of declaration that the abovesaid partition deed is invalid and unenforceable and not binding upon the plaintiff for the grounds enumerated in the plaint. In this connection, it is to be noted that the plaintiff, as regards the relief of declaration sought for by him with reference to Ex.A3 partition deed, has valued the said relief at Rs.400/- and accordingly, paid a Court fee of Rs.30.50 under Section 25(d) of the Court Fees Act, XIV of 55.

6. The plaintiff and the defendants 1 & 2 are the brothers and the sons of P.R.Komarasami.

7. Shorn of unnecessary details, it is found that even as per the case of the plaintiff, the abovesaid brothers had

already effected division of the joint family properties belonging to them under Ex.A3 partition deed and however, according to the plaintiff, inasmuch as the terms of the abovesaid partition deed had not been acted upon, it is his case that the abovesaid partition deed was only a sham and nominal document and no right accrues to any one the said document and according to the plaintiff, inasmuch as a sum of Rs.10,000/- has not been paid to the mother of the parties viz., Sellammal till her demise and as the first defendant had not withdrawn the suit laid by him in O.S.No.396 of 1988 on the file of the District Munsif Court, Bhavani and on the other hand, he had proceeded to obtain an ex-parte decree in the said suit against the plaintiff and the second defendant on 30.11.1990 and thereafter, as the plaintiff had levied another suit for partition on 15.05.1991 in O.S.No.51 of 1991 on the file of the Vacation Court, Periyar District, inter alia, also by way of ignoring the partition deed dated 10.10.1988 (Ex.A3) and further, according to the plaintiff, inasmuch as the abovesaid suit preferred by him could not be prosecuted on account of certain formal defects and after seeking permission to lay a fresh suit on the same cause of action, it is stated that the plaintiff has been necessitated to lay the present suit for the appropriate reliefs and also contended that the partition purported to be made had not been acted upon pursuant to Ex.A3 partition deed and the parties had not enjoyed the properties as allotted to them under the said partition deed and accordingly, prayed for the reliefs in the present suit.

8. The first defendant, who is the chief contestant of the plaintiff's suit, as the other defendants had remained ex-parte, resisted the plaintiff's suit by contending that the partition deed dated 10.10.1988 marked as Ex.A3 had been acted upon and thereupon, the parties to the same had been enjoying the respective shares allotted to them separately by obtaining patta, paying kist, securing service connection etc., and even the ex-parte decree obtained by the first defendant in O.S.No.396 of 1988 had been subsequently set aside and the said suit dismissed as settled out of Court and as the parties had proceeded to enjoy the properties as allotted to them under the partition deed dated 10.10.1988 independently on their own, according to the first defendant, the present suit laid by the plaintiff is nothing but to stifle and delay the enjoyment of the respective shares by the parties as allotted under the abovesaid partition deed and further, it is also pleaded by the first defendant that the suit laid by the plaintiff without seeking the cancellation of Ex.A3 partition deed is not maintainable and accordingly, prayed for the dismissal of the plaintiff's suit.

9. The case of the first defendant was accepted by the trial Court and accordingly, the trial Court dismissed the plaintiff's suit based on the materials placed on record by the parties, both oral and documentary. However, the first appellate Court, on an appreciation of the materials placed on

record by the respective parties, set aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the plaintiff, decreed the suit as prayed for. Challenging the same, the present second appeal has been preferred by the first defendant.

10. Admittedly, the parties had entered into a partition deed dated 10.10.1988 in respect of the properties belonging to them and the said deed has come to be marked as Ex.A3. Ex.A3 is a registered partition deed. Admittedly, the plaintiff is a party to the same. The plaintiff is a educated person and also a Government employee. In such view of the matter, the plaintiff cannot as a matter of course easily disregard the partition entered into by him with his brothers under Ex.A3. According to the plaintiff, inasmuch as Ex.A3 partition deed had not been acted upon, it is his case that it is a sham and nominal document and therefore, accordingly, seeking the relief that the said partition deed is invalid and unenforceable and not binding upon him, he had again sought to redo the partition with his brothers by way of the present suit.

11. As rightly found by the trial Court and also as submitted by the first defendant's counsel, it is found that the mere failure of the payment of Rs.10,000/- to the mother by the three sons by itself would not render the partition deed Ex.A3 unenforceable, particularly, considering the fact that she had died in the year 1994 and accordingly, it is seen that the abovesaid reason on its own by itself would not render the abovesaid partition as invalid and unenforceable or make it a sham and nominal document. The abovesaid ground as such in my considered opinion also would not render the partition deed invalid.

12. Materials placed on record go to show that pursuant to Ex.A3 partition deed, parties had been enjoying the separate shares allotted to them under the said deed and in this connection, the materials have been placed on record showing their separate enjoyment of the shares allotted to them by paying kist, obtaining separate service connections and laying of underground pipeline etc., and all these facts cannot be easily disregarded lightly or as a matter of course to hold that the partition deed Ex.A3 had not come into force. It is thus found that inasmuch as Ex.A3 partition deed had been put into action and accordingly, the parties had endeavoured to enjoy their separate shares as allotted to them under the said document, it is seen that the parties had proceeded to enjoy their separate shares independently and accordingly, the materials, pointing to the same both oral and documentary, had been exhibited in this matter.

13. When admittedly the plaintiff is a party to Ex.A3 partition deed and as above seen, the plaintiff is not an

illiterate person and on the other hand, an educated person and employed in the Government service, he would not have been a mute spectator in the process of the execution of the abovesaid partition deed. The plaintiff had thrown a challenge to the abovesaid partition deed more or less effectively only by way of the present suit, which has come to be laid on 23.04.1997. No doubt, the plaintiff had earlier filed a suit seeking partition in O.S.No.51 of 1991 (renumbered as O.S.No.39 of 1995) before the Vacation Court on 15.05.1991. However, the said suit had not been proceeded further, as the same had been withdrawn by the plaintiff with liberty to file a fresh suit on the same cause of action, vide order dated 01.04.1997 in I.A.No.339 of 1997 in O.S.No.39 of 1995 Ex.A9 and thereafter, the present suit had come to be laid by him. Even for the sake of arguments, the plaintiff is deemed to have thrown a challenge impliedly as regards Ex.A3 in the abovesaid suit, it is found that the said challenge has been made by the plaintiff nearly 2 1/2 years after the execution of Ex.A3 partition deed. Therefore, the contention of the plaintiff that the partition deed Ex.A3 had not been acted upon cannot be accepted readily.

14. The other ground put forth by the plaintiff for impugning Ex.A3 partition deed is that the first defendant had not withdrawn the suit preferred by him in O.S.No.396 of 1988. However, when it is found that the abovesaid suit, though had not been withdrawn at the first instance and the first defendant had obtained the ex-parte decree in the said suit, later, it is found that the said decree had been set aside at the instance of the second defendant and subsequently, the said suit was dismissed as settled out of Court. Therefore, it is seen that the abovesaid ground projected by the plaintiff for impugning Ex.A3 partition deed also does not merit acceptance. The further plea put forth by the plaintiff that owing to the pressure executed by the friends and relatives, he had given the nod to execute the partition deed Ex.A3 cannot be countenanced sans any proof pointing to the same.

15. In this second appeal, the main argument projected by the first defendant's counsel is that the plaintiff being a party to Ex.A3 partition deed, he cannot be allowed to ignore the same easily by styling the same as a sham and nominal document and when the plaintiff had accepted the same and signed the document and the document had been primarily shown to be acted upon, it is his contention that in the event of the plaintiff needing to avoid the same, the plaintiff has to seek the cancellation of the said document as per law and inasmuch as the plaintiff had not sought for the cancellation of Ex.A3 partition deed, it is his contention that the suit laid by the plaintiff is liable to be dismissed. In this connection, the counsel for the first defendant placed reliance upon the decision of the apex Court reported in 2010-3-L.W.599 (Suhrid Singh @ Sardool Singh Vs. Randhir Singh & Ors) and on a perusal of the abovesaid decision, it is found

that the apex Court has held that sans the prayer for the cancellation of the partition deed, particularly, the plaintiff being a party to the same, without seeking the cancellation of the said document and paying necessary Court fees for the same under Section 40 of the Tamil Nadu Court Fees Act, the suit laid by the plaintiff cannot be allowed to sustain. In this connection, the principles of law as regards the above position of law had been outlined by the apex Court in the following manner:

"6. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to 'A' and 'B' -- two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non-est/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act. But if 'B', a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under Section 7(iv)(c) of the Act. Section 7(iv)(c) provides that in suits for a declaratory decree with

consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of Section 7."

16. The abovesaid decision of the apex Court has been followed in the subsequent decision reported in (2017) 11 Supreme Court Cases 852 (J.Vasanthi and others Vs. N.Ramani Kanthammal (Dead) Represented by legal representatives and others) and it has been held that when the plaintiff being a party to the impugned sale transaction, without seeking the cancellation of the said transaction by paying necessary Court Fee under Section 40 of the Tamil Nadu Court Fees and Suits Valuation Act, 1955, the suit preferred by the plaintiff is not maintainable.

17. In the decision reported in 2017 (2) CTC 309 (M.Panneerselvam Vs. Susseela and 5 others), I had an occasion to determine the abovesaid issue in another matter and accordingly, held that the mere relief of declaration sought for by the plaintiffs as regards the impugned document is not sufficient, particularly, the plaintiffs being eo-nomine parties to the said transaction covered in the said decision and accordingly, following the full Bench Judgement of our High Court as well as the Division Bench of our high Court, I had held that the suit should have been laid for the cancellation of the impugned document by paying necessary Court fees and without such a prayer, the suit itself is not maintainable and the same has been determined in the following manner.

" Tamil Nadu Court Fees and Suits Valuation Act, 1955 (T.N.Act 14 of 1955), Sections 25(d) & 40 - Suit for Declaration - Cancellation of Deed - Distinction - Plaintiffs are eo-nomine parties to Sale Deed - Suit instituted to declare Sale Deed as null and void - Valuation of relief - Undervaluation of Suit - Plaintiff should have sought for relief of cancellation of Deed - Relief of declaration sought by plaintiff is improper - Valuation of Suit under Section 25(d) is incorrect - Failure to seek relief of cancellation of Deed is fatal to Suit.

Facts: Plaintiffs, who are eo-nomine parties to Sale Deed, have instituted Suit for Declaration to declare that the Deed as null and void. The plaintiff has valued the Suit under Section 25(d) of the Act and paid Court-fee thereon. Courts below have concurrently decreed the Suit. The Appellant in Second Appeal has raised legal issue of undervaluation of Suit.

Held: That the Plaintiffs are eo-nomine 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-nomine parties to the said sale transaction. Therefore, without advertting 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 in P.B.Ramjee and two others v. P.B.Lakshmanaswamy Naidu & ten others, 1996 (1) CTC 661, therein, it has been held that where minor is eo-nomine 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 abovesaid view, the Division Bench followed the Full Bench Judgment of the Madras High Court in Sankaranarayana Pillai v. Kandasamipillai, 1956 (2) MLJ 1411: AIR 1956 Mad. 670 and has also, extracted the points adjudicated by the Full Bench, in the abovesaid decision, which is extracted below:

" 18. On the other hand, the subsequent Full Bench Judgment in Sankaranarayana Pillai v. Kandasamipillai, 1956 (2) MLJ 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

nomine 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-fees 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) MLJ 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) MLJ 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."

(Para 13)

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 27.8.1987 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."

18. The above principles of law had also been outlined in the decisions reported in (2013) 3 Supreme Court Cases 182 (Board of Trustees of Port of Kandla Vs. Hargovind Jasraj and another) and CDJ 2011 MHC 4959 (T.Bai Ammal and Others Vs. T.Sampath).

19. In the light of the above position of law, when it is found that the plaintiff being a party to Ex.A3 partition deed, merely, on the alleged grounds projected by the plaintiff for challenging the same and when the said grounds are not found to be acceptable and on the other hand, when it is seen that Ex.A3 partition deed had been acted upon by all the parties pertaining thereto as above discussed and the plaintiff also having not accordingly, initiated any action challenging the said document for more than 2 1/2 years as abovenoted and even by way of the present suit, the plaintiff has not sought for the cancellation of the said partition deed as mandated under law, which could also be seen in the light of the principles of law enunciated by the decisions of the apex Court and our high Court as abovenoted, it is found that the first appellate Court had erred in upholding the plaintiff's case by holding that Ex.A3 has not come into force and that, it is only a sham and nominal document without any convincing materials projected by the plaintiff pointing to the same and in such view of the matter, the judgement and decree of the first appellate Court accepting the plaintiff's case are liable to be set aside. The substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff and in favour of the first defendant.

20. CMP.No.4623 of 2018:

(i). This petition has been laid for the reception of additional evidence by the first defendant/appellant.

(ii).The documents sought to be projected as additional evidence are the copy of the plaint in O.S.No.37 of 2012 filed by one A.R.Kavin on the file of the Subordinate Court, Bhavani and the certified copy of the evidence given by the plaintiff in the abovesaid suit and contending that in the abovesaid suit, the plaintiff had accepted the terms of Ex.A3 partition deed, which had been filed in the present suit, and the same having been acted upon, accordingly, seeking to project the same as additional evidence in support of his case, the first defendant has come forward with the application. However, when it is found that the abovesiad documents have emanated after the institution of the present suit and particularly, when it is found that the parties to the present litigation are all not parties to the suit in O.S.No.37 of 2012 as such, in my considered opinion, the projected additional evidence cannot be received for the determination of the issues involved in the matter. Further, it is also found that when the materials available on record are themselves sufficient to hold that Ex.A3 partition deed had been acted upon and given effect to

and the additional evidence are not required for the adjudication of the issues involved in the matter as such and when the additional evidence are post litem documents, accordingly, the petition for the reception of the additional evidence is not entertained and accordingly, dismissed.

For the reasons aforesaid, the Judgement and Decree dated 28.06.2002 passed in A.S.No.31 of 2002 on the file of the Additional District Judge, Fast Track Court No.IV, Erode, at Bhavani, are set aside and the Judgment and Decree dated 13.11.2000 passed in O.S.No.165 of 1997 on the file of the Subordinate Court, Bhavani are confirmed. Accordingly, the second appeal is allowed with costs. CMP.No.4623 of 2018 is dismissed. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(Co)

//True Copy//

Sub Assistant Registrar

sms
27.07.2018

To

1. The Additional District Judge,
Fast Track Court No.IV, Erode, at Bhavani.
2. The Subordinate Court, Bhavani.
- 3.The Section Officer, V.R.Section, High Court, Madras.

+1 cc to MR.R.PRABHAKAR Advocate SR.NO. 50767

Judgment made
in S.A.No.1558 of 2003

CA(CO)
ASK(31/08/2018)

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