IN THE HIGH COURT OF JUDICATURE OF MADRAS

Judgment Reserved on : 11.08.2017

Judgment Pronounced on : 20.04.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.987 of 2006
and M.P.No.1 of 2006

Raghuraja .. Appellant /Plaintiff/Respondent

Vs.

1. Philomina
2. Irudhayaraj
3. Mahimaidoss
4. Gnanaprakasam
5. Fathima Mary
6. Saminathan(Deceased)
7. Sabastian
8. Venu Chettiar (Deceased)
9. Isebella Rosalin
10. Minor Angelin Priyanka
   (R9 and R10 bring on records as LRs of thereafter deceased R6 Vide order of this Court dated 25.02.2015 made in M.P.No.1 to 3 of 2014 in S.A.No.987 of 2006)
11. V.Lakshmi
12. V.Prabu
13. Jamunarani
14. S.Kalaiveni
15. S.Selvapathy
16. V.S.Selvakumar
17. S.Gunasekar
   (Respondents 11 to 17 brought on record as LRs of the deceased R8 vide order of this Court dated 25.03.2015 made in MP.No.4 to 6 of 2014)
18. Latha
19. Nandhini
20. Minor Suresh
   Rep. By his Guardian & Next friend/Mother Latha.

   (Respondents 18 to 20 brought on record as LRs of the deceased R12 vide order of this Court dated 23.03.2016 made in MP.No.1 of 2015 in S.A.No.987 of 2006) ... Respondents /Defendants/Appellants.

PRAYER:-

This second appeal has been filed under Section 100 of CPC, against the judgment and decree dated 11.08.2005 passed by the learned Principal Subordinate Judge, Chengleput, in A.S.No.31 of 2005, reversing the Judgment and decree dated 29.10.2003 passed by the learned District Munsif Court, Thirkazhukundram in O.S.No.80 of 1998.

For Appellant : Mr.S.Vediappan
for Mr.R.Karthikeyan

For Respondents : Mr.V.Ayyadurai, Senior counsel
for Mr.A.Durai Eswar for R11 to R.20
Mr.A.K.Venkatesan, for R3, R4, R5, R7, R9 and R10.
Mr.T.Muruga Manickam, Senior counsel
for Mr.Zeenath Begum for R2.

JUDGMENT

This second appeal arises out of the judgment and decree dated 11.08.2005 passed by the learned Principal Subordinate Judge, Chingleput, in A.S.No.31 of 2005, reversing the Judgment and decree dated 29.10.2003 passed by the learned District Munsif Court, Thirkazhukundram in O.S.No.80 of 1998.

2. Brief facts of the plaintiffs' case is as follows:-

The plaintiff is the son of the first defendant. The suit properties belongs to the plaintiff and first defendant's ancestors. The plaintiff has three brothers and three sisters and all are got married and living separately. The plaintiff is bachelor and attained majority just two years back. The plaintiff understands that the second defendant and her henchmen got some signature from the first defendant in the year 1985 and registered the sale deed with regard to 'A' Schedule property. The suit A and B schedule property are in Plot No.248. There was a civil suit between the 1st defendant and Rani @ Amirthammal for damages and the same ended in favour of the 1st defendant herein. In the said suit, it was admitted that the suit property belongs to 1st defendant herein. In the year, 1980 the plaintiff's mother died. At that time, the plaintiff was a small boy and his father the 1st defendant was not mentally not right. At that time, the second defendant and her husband got easy access to the first defendant house under the guise of helping and obtained his signature. Then, they created the sale deed in favour of them in respect of Suit 'A' Schedule Property. The alleged sale deed by the first defendant as guardian of the plaintiff was not valid and binding upon the plaintiff. The preparation of the sale deed was not known to the plaintiff as well as his brothers and sisters till last year. As such, while searching for some records relating to his ancestral property, he came to know about the alleged sale of Suit 'A' Schedule Property. The extent of the ancestral property in Mamallapuram Village to an extent of 4.18 cents in Nanja and Punja was available. On verification, it was found that 3 ½ cents fo the said land is in possession of 2nd defendant and his family. The part of the land is in dispute with said Raniammal. Hence, the plaintiff is entitled to get possession with regard to his share in 'A' schedule property and entitled to get possession of 'B' schedule property. So the plaintiff has come forward with the suit for declaration that the Sale Deed in favour of 2 to 8 defendants is null and void and for other reliefs.

3. The first defendant filed the separate written statement contending that the suit is frivolous and vexatious and he has also denied the allegations contained in the plaint. The defendants 2 to 8 remained exparte in the suit.

4. Before the Trial court, the Plaintiff examined himself as P.W.1 and produced documents Ex.A.1 to A.5 to prove his contention. On the side of the defendants, D.W.1 deposed and no document was produced. After contest, the trial court, decreed the suit as prayed for. Aggrieved over that the defendants 2 to 8 preferred the first appeal . The learned Subordinate Judge, Chenglepet, reversed the finding of the Trial Court by allowing the appeal and dismissed the suit. Aggrieved upon that, the plaintiff preferred the second appeal.

5. At the time of admission, the following substantial questions of law was framed by this court for consideration:-

1) Whether the findings of the first appellate Court that the suit is barred by Article 60 of the Limitation Act is correct.

2) Whether the findings of the first appellate Court that the prayer for the declaration of the sale deed as null and void is in effect to get the sale deed set aside and such prayer should be valued as per the market value of the 'A' schedule properties under Section 40 of the Tamil Nadu Court Fees and Suit Valuation Act is correct?

6. The learned counsel appearing for the appellant/plaintiff would contend that the well settled legal principles that the suit for declaration of title for immovable property does not become time barred so long as the right of the plaintiff on such property subsists. The right to bring such suit is a continuing right, which is not lost so long as the right to the property in respect of which the declaration is

sought for is not extinguished. The learned counsel appearing for the appellant further submitted that there is a difference between the suit for cancellation of instrument and the suit for declaration that the instrument is not binding upon the plaintiff. Hence, the finding of the first appellate Court that the declaration of the sale deed is null and void and it should be valid as per the market value of the 'A' Schedule property under Section 40 of the TNCF Act is not correct. By way of oral partition, the suit property which is an ancestral property was allotted to the plaintiff and when the plaintiff went to take possession of the property, he was prevented by the defendants on the strength of the sale deed dated 31.03.1985. The first appellate Court without considering these aspects, arrived to a wrong conclusion. Hence, the same is liable to be set aside. In support of his contention, the learned counsel appearing for the appellant/Plaintiff relied upon the Apex Court ruling reported in (2006) 5 Supreme Court Cases 353 in PREM SINH AND OTHERS Vs. BIRBAL AND OTHERS.

7. Per contra, the learned counsel appearing for the respondents would contend that after hearing elaborate arguments by both sides and considering in detail the oral and documentary evidence, the first appellate Court came to the correct conclusion and dismissed the suit holding that the Plaitniff is only a coparcener and he cannot file a suit for partition of his share and not entitled to seek declaratory relief for the whole suit property. Even though, the plaintiff was having proof for his age, he failed to produce the same before the Court. Hence, the first appellate Court came to the conclusion that the suit was time barred on the basis of Ex.A1 Sale deed in which the age of the plaintiff was mentioned as 10 years. The non production of material evidence by the plaintiff leads to drawing adverse inference by the Court. In support of his contention, the learned counsel appearing for the respondents/Defendants relied upon the Apex Court ruling reported in (1968) 3 SCR 862 in GOPAL KRISHNAJI KETKAR Vs. MOHAMED HAJI LATIF & OTHERS.

8. I have heard the rival contentions and perused the materials available on record.

9. On perusal, it is clear that 'A' schedule properties consists of 3 items and the same were sold by the first defendant to the defendants 2 to 8 on 31.03.1985 through registered sale deed and the same was executed by the first defendant for himself and on behalf of his minor children, namely, 17 years old Prabhu, 13 years old Jamuna Rani and 10 years old Raghuraja who is the Plaintiff herein. As far as the said 'B' schedule property is concerned, no declaratory relief is claimed against the defendants 2 to 8 in the suit. Regarding

'A' schedule property, declaratory relief as well as recovery of possession is claimed by the plaintiff against the defendants 2 to 8. However, in the Plaint, there is no pleadings with regard to 'B' schedule properties, which are in possession and enjoyment of the defendants 2 to 8. The defendants 2 to 8 have not contested the case before the trial Court. They were set exparte. However, the defendants 2 to 8 have preferred the first appeal before the first appellate Court. The first defendant, who is the father of the plaintiff even though contested the case in the Trial Court, has not preferred any appeal against the judgment and decree of the trial Court. The trial Court decreed the suit in favour of the plaintiff on the basis of the exparte evidence of plaintiff, since the first defendant admitted the case of the plaintiff, The Trial Court has not discussed the evidence both oral and documentary evidence adduced by the plaintiff in its judgment. Admittedly, the defendants 2 to 8 have not taken any steps to set aside the exparte decree, but, they preferred the first appeal on the ground that the suit was barred by limitation and Court fee paid by the plaintiff is lesser than the required court fee to be paid. After hearing both sides, the first appellate Court came to the conclusion that the suit filed by any person after becoming major seeking declaration of any document as null and void and to cancell the same has to be filed within three years from the date of attaining majority by the plaintiff. The plaintiff has not produced his date of birth certificate or any age proof document. Even though he is the driver by profession and is having driving licence, he has not produced the same before the Court. Hence, the first appellate Court on the basis of age of the Plaintiff mentioned in Ex.A1 as 10 years, calculated that he would have become major in the year 1993 or 1994, but the suit was filed only on 23.07.1998 and found that the same is after expiry of more than 4 to 5 years from the date of attaining majority. Hence, concluded that the suit was barred by limitation. Pointing it out, in this appeal, the learned counsel appearing for the appellant vehemently contended that when the defendants have not pleaded anything about the limitation and have not let in any evidence to that effect, the finding of the Court below is unwarranted and the same is to be set aside. Further he would contend that the finding of the court below that in rejection of relief sought for in the plaint, the plaintiff has to establish his case by marking of documents on his own and otherwise he cannot succeed, is not correct.

10. Admittedly, Ex.A1 Sale deed was executed by the first defendant in favour of the defendants 2 to 8. The only contention raised by the plaintiff who is the son of the 1st defendant is that it was obtained not as a sale deed and signature was obtained in blank papers from the first defendant,

while he was mentally not all right. However, the Plaintiff has come forward with the suit for declaration that Ex.A1 Sale deed is null and void. The defendants 2 to 8 admittedly, have not appeared before the trial Court and they have not filed any written statement or let in any evidence opposing the claim of the Plaintiff. However, it is contended that as far as question of law is concerned, the court is empowered to decide the same on merits even if the parties have not come forward to raise the same. Admittedly, the defendants 2 to 8 failed to appear before the trial court and remained exparte. However, they preferred the First Appeal and the same was contested by the Respondent/Plaintiff. In such circumstances, the First Appellate Court is bound to decide the appeal on merits and it has done so. As such, there is no error in the disposal of the appeal by the First Appellate Court. While disputing the same, it is contended by the Appellant/Plaintiff that the conclusion to dismiss the suit on the issue of limitation is not proper. Since there was no pleadings or framing of issues and evidence let in relating to issue of limitation. However, it is pointed out that in the case on hand, as the question of limitation was not raised and considered as pointed out in the Ruling reported in 2006 (5) SCC 658 [Balasaria Construction (P) Ltd., Vs Hanuman Seva Trust and others], the appellant seeks to entertain the appeal. In the said Ruling, it is held as follows:-

> " 8. After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 1 (d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time. The findings recorded by the High Court touching upon the merits of the dispute are set aside but the conclusion arrived at by the High Court is affirmed. We agree with the view taken by the trial court that a plaint cannot be rejected under Order 7 Rule 11(d) of the Code of Civil Procedure."

It is also contended by the learned counsel for the appellant that Ex.A.1 Sale Deed was obtained by playing fraud by the defendants and if the misrepresentation is in respect of character of document is a void document and if misrepresentation relates to content of document, it is voidable document and in the present case, Ex.A.1 is only a voidable document and as such, the Plaintiff is entitled to file a suit within a period of 12 years and the Plaintiff has done so. In this connection, the learned counsel for the appellant relied on the Ruling of the Apex court reported in (2006) 5 SCC 353 [Prem Sinh and Others Vs. Birbal and others], wherein it is held as follows:-

> "12. An extinction of right, as contemplated by the provisions of the Limitation Act, prima facie would be attracted in all types of suits. The Schedule appended to the Limitation Act, as prescribed by the Articles, provides that upon lapse of the prescribed period, the institution of a suit will be barred.Section 3 of the Limitation Act provides that irrespective of the fact as to whether any defence is set out is raised by the defendant or not, in the event a suit is found to be barred by limitation, every suit instituted, appeal preferred and every application made after the prescribed period shall be dismissed.
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> 13. Article 59 of the Limitation Act applies specially when a relief is claimed on the ground of fraud or mistake. It only encompasses within its fold fraudulent transactions which are voidable transactions.
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> ....
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> 16. When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non-est in the eye of law, as it would be a nullity.
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> 17. Once, however, a suit is filed by a plaintiff for cancellation of a transaction, it would be governed by Article 59. Even if Article 59 is not attracted, the residuary Article would be.
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> 28. If a deed was executed by the plaintiff when he was a minor and it was void, he had two options to file a suit to get the property purportedly conveyed thereunder. He could either file the suit within 12 years of the deed or within 3 years of attaining majority. Here, the plaintiff did not either sue within 12 years of the deed or within 3 years of attaining majority. Therefore, the suit was rightly held to be barred by limitation by the trial court. ...."

In the case on hand, the claim of the Plaintiff is that he was a minor at the time of execution of Ex.A.1 Sale Deed and his father was mentally disturbed due to the death of his wife at that time. Taking advantage of the same, the 2nd defendant and her men under the guise of helping the first defendant, fraudulently took his signature in the Stamp Papers and created Ex.A.1 Sale deed. Thus, the Plaitniff contends that the 2nd defendant and her men played fraud on the 1st defendant and obtained Ex.A.1 Sale Deed. However, apart from the evidence of the Plaintiff himself, there is no independent evidence to prove that the 1st defendant was in the disturbed state of mind. There is also no evidence to show that the 2nd defendant and her men was having access to first defendant and making use of the same, fraudulently got the signature of the 1st defendant and prepared Ex.A.1 sale deed. In fact, no steps was taken to treat the father of the Plaintiff who is the 1st defendant in the suit, who is stated to be mentally reserved person. In such circumstances, the contention of the Plaintiff that Ex.A.1 Sale Deed is obtained in fraudulent manner and therefore, is a voidable document, cannot be accepted. Further, as per the above said Ruling, it is clear that irrespective of any defence being set out or not by the defendants, the suit is found to be barred by limitation, hence, the same is liable to be dismissed. Thus, the contention of the appellant/plaintiff is not sustainable for the reasons stated above.

11. As per the above said Ruling, there are two options given to the plaintiff to file the suit to set aside the sale of property effected while he was a minor. He could either file the suit within 12 years of the deed or within three years of attaining majority. In the above said case, the plaintiff did not either file the suit within 12 years of the deed or within three years of attaining majority. Therefore, the Apex Court upheld the verdict of the trial Court by setting aside the finding of the first appellate Court and High Court. We have to analyse the Plaintiff's case on the basis of the above said Ruling. In this case also Ex.A1 Sale was executed on 31.03.1985 while the plaintiff was minor. As such, the plaintiff is entitled to file the suit within 12 years of the deed or within three years of attaining the majority. Admittedly, from the date of execution of Ex.A.1 Sale Deed, the period of 12 years ended on 31.03.1997, but the suit was presented only on 27.03.1998. Apparently the suit has not been filed within 12 years from the date of Ex.A1, but only after 13 years it is filed. As far as the second option to file the suit within 3 years from the date of attaining majority, even if the plaintiff claimed in the evidence that at the time of execution of Ex.A1 sale deed, he was 8 years, his father, the first defendant while executing Ex.A.1 sale deed in the year 1985, has narrated the age of his children, namely, 17 years old Prabhu, 13 years old

Jamuna Rani and 10 years old Raghurajaj. On the side of the plaintiff, to contradict the contention in Ex.A1 regarding the age, no documentary proof is produced by the plaintiff. Admittedly, the plaintiff is working as driver and being a driver certainly, he will be possessing driving licence. The date of birth mentioned in the driving licence is authenticated one, but the same is not produced. Further more, the first appellate Court relied on the ground that the plaintiff has signed in English in the plaint and so there is a possibility of he having the school records. The Plaintiff could have produced the same by himself or by summoning the same from the school or the Licence from the RTO Office. In such situation, the learned counsel appearing for the respondents would submit that the adverse inference has to be drawn against the Plaintiff who has failed to produce the best possible evidence would be with him.

12. In these aspect, the learned counsel appearing for the respondents/defendants relied upon the Apex Court ruling reported in (1968) 3 SCR 862 in GOPAL KRISHNAJI KETKAR Vs. MOHAMED HAJI LATIF & OTHERS, wherein it is held as follows:-

> "Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for these desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof."

The above said Ruling is clearly applicable to the facts of this case. Certainly, there is possibility of Plaintiff possessing the driving licence and the non production of the same is fatal to his case. Further, when the plaintiff failed to produce his age proof, the fit person to speak about the age of the plaintiff is his father. Even though, the father of the Plaintiff, who is the 1st defendant in suit failed to disclose the correct age of the son, by coming to court, the son is absolutely entitled to rebut the same by producing proof to show his correct age. However, the plaintiff miserably failed to produce the age proof certificate. In such circumstances, the version of the father of the plaintiff in Ex.A1 is to be taken into account to determine the age of the Plaitniff. As per Ex.A1, the Plaintiff was aged about 10 years in 1985. Thus, he would have completed his 18 years in the year 1993 itself, but the present suit was presented only on 27.03.1998. It is therefore clear that the suit was filed by the Plaintiff only 5 years after attaining majority and within the three years as Required by law. Thus, the Plaitniff has not chosen to file the suit within the time limit as stated in the above said Apex Court verdict. As such, following the above said Ruling, the first appellate Court correctly held that the suit was barred by limitation. However, the learned counsel appearing for the appellant would vehemently contend and submit that right to bring such a suit is continuing right and the same is not lost so long as the right to the property in respect of which the declaration is sought for is not extinguished. The above said argument itself is against the Ruling referred on the side of the appellant himself. As such, the said contention of the appellant/Plaintiff is not sustainable. Further, when the suit itself is barred by limitation, the issues regarding the payment of Court fee raised by the appellant is irrelevant and there is no need to consider the same.

13. From the above discussion, it is clear that there is no merit in the appeal and accordingly, the substantial question of law raised by the appellant is answered against him. The appellant has miserably failed to prove his case by way of documentary proof. Hence, there is no need or necessity to interfere with the conclusion of the Lower Appellate Court. Therefore, this Court come to the conclusion that this appeal is unsustainable and the same is to be dismissed. The Point is answered accordingly.

14. In the result, the second appeal is dismissed. No costs. The Judgment and Decree dated 11.08.2005 in A.S.No.31 of 2005 passed by the learned Principal Subordinate Judge, Chengleput is hereby confirmed. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

rrg/nvsri

To

1. The Principal Subordinate Court,
   Chengleput.

2. The District Munsif Court,
   Thirukazhukundram.

3. The Section Officer,
   V.R.Section, High Court,
   Madras.(2 Copies)

+1cc to Mr.V.Ayyadurai, Advocate, S.R.No.29336
+1cc to Mr.Zeenath Begum, Advocate, S.R.No.29463
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+1cc to Mr.A.K.Venkatesan, Advocate, S.R.No.30165

S.A.No.987 of 2006

SS(CO)
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